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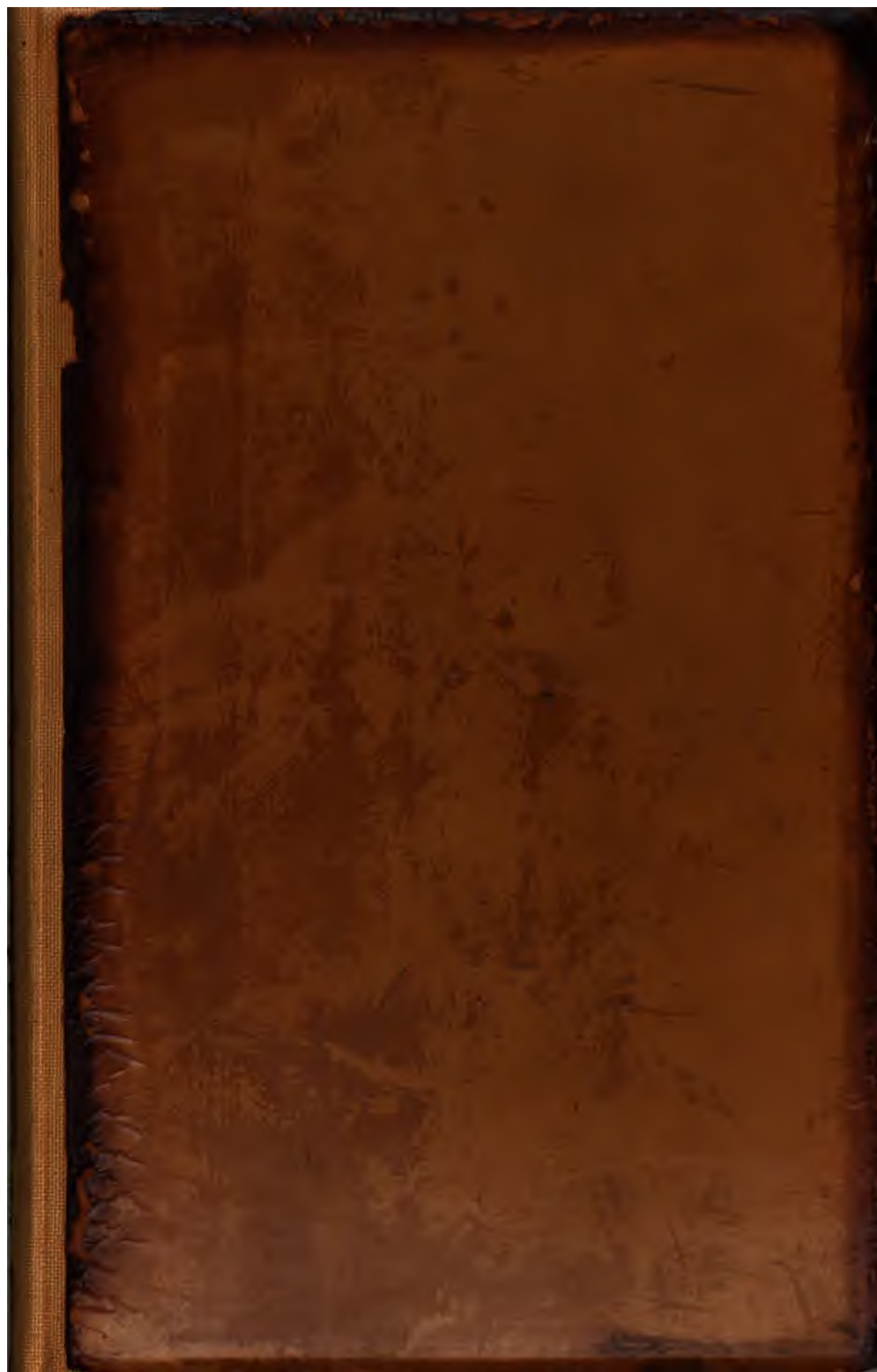
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C A S E S
DECIDED IN
THE HOUSE OF LORDS,
ON APPEAL
FROM THE COURTS OF SCOTLAND.

FROM 18 MAY TO 16 AUGUST 1838.

REPORTED BY
PATRICK SHAW, Esq. ADVOCATE,
AND
CHARLES HOPE MACLEAN, Esq. BARRISTER AT LAW.

VOLUME III.
CONTAINING
A GENERAL INDEX TO THE THREE VOLUMES.

EDINBURGH:
THOMAS CLARK, LAW BOOKSELLER, GEORGE'S STREET;
AND
SAUNDERS AND BENNING, LONDON.
1839.

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and concluding for damages. The case was remitted from the Court of Session roll to the Jury roll on the 16th of December 1834; but preliminary defences having been stated, as well as defences on the merits, it was retransmitted to the Court of Session roll; and on the 25th of January 1835 the Lord Ordinary repelled the preliminary defences, and of new remitted the cause to the Jury roll. Thereafter a record was prepared, but before it was closed the appellants made a motion before the Lord Ordinary, "That this case shall be remitted to the Court of Session, to be proceeded with in such manner as shall appear to be most expedient for the administration of justice, as containing matter to which trial by jury is not beneficially applicable." Although, in point of form, the question was, as to whether the case should be sent to the Court of Session roll or not, yet in substance it was, (and it was so argued,) whether the Court could dispense with a trial by jury. The Lord Ordinary verbally reported the motion to the Inner House, who ordered the question to be argued before the whole Judges, which was done accordingly; and their Lordships delivered the following opinions¹:—

Lord President.—"I have carefully considered the acts of parliament referred to by the parties, and have formed a very decided opinion as to the question now before us. In the first place, it appears to me to be perfectly plain, that the object and intention of the legislature in these enactments was, as far as possible, to put an end to the old procedure of taking proof on commission. This method of procedure was dis-

¹ These opinions were revised by their Lordships and laid before the House of Lords.

“ agreeable not only to the House of Lords, but also
 “ to ourselves. But the grievance which it occasioned
 “ to the House of Lords was prodigious; and the feel-
 “ ing of that grievance chiefly led to the introduction
 “ of jury trial into this country. In interpreting the
 “ acts, therefore, we ought to endeavour so to construe
 “ them as to give effect, as far as possible, to the inten-
 “ tion of the legislature, and to extend, as far as we
 “ can, the provisions in favour of jury trial.

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“ I have formed my opinion upon two clauses in the
 “ act of 1819. I do not go further. The first of
 “ these is the 12th section of the act. In this section,
 “ the words ‘beneficially applicable’ are unfortunate.
 “ It is a loose phrase, and capable of many construc-
 “ tions. It may mean beneficially applicable in regard
 “ to the matter at issue, or in regard to the mode of
 “ proof, or in regard to the time that may be occupied
 “ in ascertaining the facts. These are different senses
 “ in which the phrase may be understood. But I can-
 “ not interpret it as having reference to the mere
 “ question of difficulty, as, if that were its meaning,
 “ you might have an argument raised in every case,
 “ as to whether or not it was one which would be
 “ attended by difficulty if tried by a jury. But, be-
 “ sides, I cannot take this clause by itself; I must
 “ consider it in connexion with the 13th section. By
 “ this section it is provided that the powers of taking
 “ proof on commission shall remain to the Court,
 “ ‘save and except in the cases concluding for damages
 “ ‘herein-before enumerated.’ This is just equivalent
 “ to saying, that in such cases it shall not be compe-
 “ tent to take proof on commission; for wherever a
 “ general power is conferred under an express excep-
 “ tion, this must be held to mean that, in regard to

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“ the matter excepted, no such power shall be exercised. Take, for instance, the case of a trust deed in which the trustees are empowered to name a factor, and which also contains a power to them to allow a competent salary to the factor, provided he is not one of themselves. Does this not amount to a prohibition, not certainly to their naming a factor from their own number, but to their allowing a salary to a factor elected from their own number? Now, here the case is the same: the prohibition is equally express against our powers of taking proof on commission in actions of damages. I regret that I have been compelled to arrive at this conclusion, especially on my own account, as this case will probably come to be tried by me. But, at the same time, I must say that I never saw a simpler coal case, as it is set forth in the summons. The defenders are charged with working the coal so close to the roof as to leave an imperfect support, thereby occasioning an inundation, to the injury of an adjoining coal pit. I do not know what technical terms may be requisite to prove this charge. It is impossible to foresee what difficulties of this kind may occur. But, in regard to the matter of fact alleged, it is the simplest of all the coal cases I ever knew.”

Lord Justice Clerk.—“ In regard to the question of power, and in reference to the acts of parliament, which I have carefully considered, I am sorry to say that I have been led to form a very decided opinion in entire conformity with that now expressed by your Lordship. I shall now state the grounds upon which I rest that opinion. I agree in the general observation made by your Lordship, as to the great object which the legislature had in view in framing

“ these enactments. The object was to extend the
 “ benefits of jury trial to Scotland, and to get rid, as
 “ far as possible, of the system of taking proofs on
 “ commission in any case. The evils of this system
 “ had been deeply felt, and the House of Lords had
 “ repeatedly complained of it. I sat on the commission
 “ in 1810, and I remember that it was then the
 “ opinion of a number of the commissioners—I do not
 “ say how many—that that system ought to be super-
 “ seded by jury trial, at least in many cases. Nothing
 “ was then done, in consequence of this opinion; but
 “ we know that in 1815 an act was passed for the
 “ purpose of introducing jury trial to Scotland. There
 “ is one section in that act, which I cannot overlook
 “ in considering the present question—that is, the 5th
 “ section, by which, in every case of damages, the jury
 “ are invested with the absolute power of assessing the
 “ amount of damages. By this provision the Court
 “ was for ever relieved of this duty, which thence-
 “ forward was imposed upon juries alone. Then I
 “ cannot entertain any reasonable doubt, that when,
 “ in 1819, the legislature came to enumerate a class
 “ of cases as appropriate to the Jury Court, it meant
 “ to declare that it was proper and expedient that all
 “ these cases should be tried by jury. That I take to
 “ be the meaning of the 1st section of the act. And
 “ when I consider it in connexion with the previous
 “ provision, which rode over the whole of the new act,
 “ viz. that the jury should possess the sole power
 “ of assessing damages, I cannot understand it to
 “ mean any thing but that the whole of this class of
 “ cases was withdrawn from the jurisdiction of the
 “ Court of Session. Then it appears to me that the
 “ whole of the sections which follow the three first

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“ apply to the non-enumerated cases only, and have
“ no reference to that class which, by the first section,
“ were appropriated to the Jury Court. And it is a
“ strong circumstance that this interpretation seems to
“ have been in entire conformity with the understand-
“ ing of the whole profession; for is there a single
“ case since the date of that act, with the exception
“ of the non-enumerated cases, in which the Court has
“ been called upon, as now, to withdraw it from the
“ cognizance of a jury? I know of no instance of this;
“ I have heard no such instance stated; and therefore
“ I conclude that, until now, it has been the general
“ understanding of practitioners, of the Court, and of
“ the country at large, that such a proceeding was
“ incompetent under the act. Then, with regard to
“ the 12th section, I am very much of the same
“ opinion as your Lordship. I think that it embraces
“ only the cases not enumerated; and the concluding
“ words of the section, which have been so much re-
“ lied upon, ought, as I think, in fair construction, to
“ be applied only to the same class of non-enumerated
“ cases. It refers to cases turning upon matters of
“ complicated accounts, which cannot properly be the
“ subject matter of actions of damages; and then it
“ goes on to refer to other matter to which trial by
“ jury is not beneficially applicable. Now, can I, with
“ any regard to the general meaning of the statute,
“ interpret these words, which, as your Lordship ob-
“ served, are rather loose and ambiguous in themselves,
“ to extend to actions of damages, when I remember
“ the clause by which it is provided that such actions
“ shall be determined by a jury, unless so far as they
“ involve questions of law or relevancy? Then the
“ 13th section furnishes, I do think, a most important

“ addition to the argument. The saving clause in
 “ that section rides over the whole act. The section
 “ appears to me most positively to say, that it shall be
 “ competent to the Court of Session to take proof on
 “ commission in all cases, save and except the cases
 “ enumerated. We are thus thrown back to the
 “ 1st section, in which these cases are enumerated, and
 “ we find that actions of damages, such as the present,
 “ form one branch of them. The 13th section appears
 “ to me, therefore, distinctly to provide, that in such
 “ a case as the present it is incompetent for the Court
 “ to order proof on commission. I agree with the
 “ remark of the Dean of Faculty, that, after the dis-
 “ tinct provision of the 1st section, nothing but express
 “ words, which could leave no doubt that the enu-
 “ merated cases were referred to by the 12th section,
 “ would entitle us to put any construction on that
 “ section at variance with the former. I have looked
 “ into the other acts referred to, and find nothing in
 “ them to warrant such a construction. It would be
 “ a contradiction to the previous enactment, which
 “ nothing but express words would entitle us to give
 “ effect to. I have also attended to that section of the
 “ 6th Geo. IV. in which it is declared that the enu-
 “ merated cases shall be discussed and determined in
 “ the Jury Court.

“ There is another section in the same act, which
 “ seems to me to be of considerable importance to the
 “ present question, although it has not been adverted
 “ to by the counsel on either side, — I mean the
 “ 33d section, which contains several important pro-
 “ visions. It relates to the power of the Jury Court
 “ to remit cases to the Court of Session in various
 “ circumstances, and concludes with these words:—

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“ ‘And if there shall remain matter of fact to be
“ ‘ascertained between the parties, the said matter
“ ‘shall be tried by jury.’ It seems here clearly con-
“ templated by the legislature, that in all those cases
“ enumerated as peculiarly appropriate to the Jury
“ Court, and in which any question of law or relevancy
“ had occurred to justify a remit to the Court of
“ Session, that still, in such cases where any matter of
“ fact remained disputed by the parties, it should not
“ be competent to the Court of Session to allow a
“ proof on commission of such matter of fact, or to do
“ any thing but to remit the case to the Jury Court,
“ there to be disposed of by jury trial. I do think
“ that the provisions of this section are quite in con-
“ sistency with the construction which I hold to be
“ the fair construction of the act 1819.

“ If a door is to be opened for the consideration of
“ the applicability of trial by jury to each of those
“ cases so familiarly known as jury cases, if parties
“ are to be allowed in every case of this description
“ to enter upon a discussion as to whether, in its
“ peculiar circumstances, it is one to which jury trial
“ is or is not beneficially applicable, it is obvious that
“ the course of justice would be constantly embar-
“ rassed by needless discussions. We know that there
“ are many cases in which trial by jury is attended
“ with great trouble, not only to the parties, but also
“ to the counsel, judges, and jury; and, if a door is
“ to be again opened to the admission of the question
“ in each of these, whether it will be most beneficially
“ disposed of by jury trial, or by taking proof on com-
“ mission, it may be seen very clearly what will be
“ the result—the matter will just be thrown as loose
“ as ever it was, and in every instance it will fall for

“ the Court to decide whether the parties are to be
 “ admitted to or excluded from jury trial.”

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Lord Gillies.—“ I am sorry to say that I have arrived
 “ at a totally different conclusion ; and I will state
 “ the grounds upon which I have formed my opinion.
 “ Ever since jury trial was introduced into Scotland,
 “ or at least almost ever since, certain cases have been
 “ enumerated as peculiarly fitted for that mode of
 “ trial. They are well known by the name of the
 “ enumerated cases, and the others go by the name
 “ of the non-enumerated cases. The question before
 “ us is, whether we have the power, in any of the
 “ enumerated cases, and under any circumstances, of
 “ sending them back from the Jury Court to the
 “ Court of Session as a Court more fitted for their
 “ disposal. I differ totally from the assertion, that to
 “ all the cases of this class trial by jury is beneficially
 “ applicable. During the short period in which the
 “ Jury Court has existed in Scotland many cases have
 “ occurred belonging to this class, and which were so
 “ ill adapted for trial by jury, that we have found it
 “ expedient to urge the parties to settle them other-
 “ wise. But I need not say any thing to prove the
 “ frequent occurrence of such cases ; for the Dean of
 “ Faculty himself informed us, that in England such
 “ cases frequently occur, and that there the evil is so
 “ severely felt, of being compelled to try them by
 “ jury, that the Judges have endeavoured to obtain
 “ an act of parliament to invest them with that very
 “ power which it is now questioned whether we possess.
 “ But the point we are now to settle is not whether a
 “ bill ought to be prepared to give us such a power,
 “ but whether the acts which are passed do not confer
 “ upon us the very power which the Judges of England

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“ so deeply feel the want of. It has been said, that
 “ no cases of complicated accounting can be expected
 “ to occur in actions of damages. I totally differ from
 “ this position. All actions in regard to moveables
 “ may give rise to such questions. Take the case of
 “ an action of damages for wrongous imprisonment
 “ upon a meditatione fugæ warrant, where the party
 “ denies that he owes any thing to the defender, and
 “ asserts that the balance of their transactions shows
 “ a result in his favour. This at once raises a question
 “ of accounting which may be the most complicated
 “ that ever came before the Court. Many such
 “ actions may be figured; and it must be admitted,
 “ that many of the enumerated cases do occur, involv-
 “ ing inquiries as to which jury trial cannot be said
 “ to be beneficially applicable.

“ The question then is, whether in such cases we are
 “ excluded by the statutes from trying them otherwise
 “ than by a jury. It has been said that the power of
 “ assessing damages shows that they are exclusively
 “ appropriate to trial by jury. It is true that the jury
 “ by these enactments possesses the powers of assessing
 “ damages; but that is only if they find for the pur-
 “ suer. But it does not follow that if they do not find
 “ for the pursuer, but remit the case to the Court of
 “ Session, to be disposed of by them, that in that
 “ event the case must go back to the jury for ultimate
 “ disposal. By the 59th Geo. III. the Court of
 “ Session are bound at once to send all actions of
 “ damages to the Jury Court. This was an early en-
 “ actment, and has never been departed from. The
 “ moment defences are lodged in such cases, the Court
 “ of Session ceases to have further jurisdiction in re-
 “ gard to them. They are immediately sent to the

“ Jury Court, and that Court is required to settle an
 “ issue for trial. By this act then there are two classes
 “ of cases provided for—the enumerated and the non-
 “ enumerated. In the latter the Lord Ordinary is
 “ empowered to prepare issues; but in the enumerated
 “ he has no power but to remit to the Jury Court, to
 “ have an issue prepared there. Then we come to
 “ section 12th of the act, and there we find it enacted,
 “ ‘ That it shall be competent and lawful for the Jury
 “ ‘ Court, when it appears to the said Court, in the
 “ ‘ course of settling an issue or issues,’ &c. This shows
 “ that the section alludes to that class of cases in which
 “ the issues are prepared in the Jury Court, not in the
 “ Court of Session. The section provides, in regard to
 “ them, that when there is a question or questions of
 “ law or relevancy involved, it shall be competent to
 “ the Court to remit back the whole process to the
 “ Court of Session, in order ‘ that the question or ques-
 “ ‘ tions of law or relevancy may be considered and
 “ ‘ determined there.’ I read this portion of the clause
 “ with reference to another section to which I shall
 “ presently refer. Then comes the important clause,
 “ in which it is farther provided, ‘ That it shall be
 “ ‘ competent for the Jury Court, when it appears to the
 “ ‘ said Court, in the course of settling an issue or issues,
 “ ‘ that a case turns upon matter of complicated accounts
 “ ‘ or other matter to which trial by jury is not benefi-
 “ ‘ cially applicable, to remit back the whole process
 “ ‘ and productions as aforesaid.’ It is said that this
 “ relates only to the non-enumerated cases. I think
 “ that it refers to both classes; but if it is applicable
 “ only to one class, I would say that it is applicable
 “ only to the enumerated cases, because in the non-
 “ enumerated cases the issues are settled by the Court

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“ of Session generally, and in the enumerated cases
 “ that duty is imposed solely upon the Jury Court.
 “ Now, the section says, that it shall be competent for
 “ the Jury Court to remit, when it appears to them, in
 “ the ‘ course of settling an issue or issues,’ that the
 “ case is one to which trial by jury is not beneficially
 “ applicable. This section, therefore, appears to me
 “ to be unambiguous, and to refer clearly to the enu-
 “ merated as well as the non-enumerated cases.

“ Reference is made to section 13, as inconsistent
 “ with this view. But, with great deference, I would
 “ say, that this conclusion is founded on a great mis-
 “ take as to the meaning of that section. It provides,
 “ ‘ that nothing in this act contained shall extend or be
 “ ‘ construed to extend to prevent the Court of Session,
 “ ‘ in either of its Divisions, or the Lords Ordinary
 “ ‘ (save and except in the cases concluding for
 “ ‘ damages herein-before enumerated), or the Judge
 “ ‘ Admiral, &c., to take proof on commission.’ Now,
 “ it is said, why save and except the cases concluding
 “ for damages? For this plain reason, that such cases
 “ were not before the Court of Session. The Court of
 “ Session had nothing to do with them, and had no
 “ jurisdiction in regard to them. They belonged ex-
 “ clusively to the Jury Court, and therefore in them
 “ the Court of Session had no power to order proof on
 “ commission. But it is perfectly plain that no infer-
 “ ence can be drawn to limit the powers of the Jury
 “ Court from this saving clause, introduced, perhaps
 “ unnecessarily, as to cases in which the Court of Ses-
 “ sion could not allow proof on commission, simply
 “ because they were not before them. If the section
 “ had not contained this exception, it might have been
 “ contended that the Court of Session might have

“ ordered proof on commission, in the enumerated
 “ cases, before remitting them to the Jury Court.

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“ I have very little more to say; but there is a clause
 “ in the act of 6 Geo. IV. which appears to me to be
 “ of great importance, and on which sufficient stress
 “ has not been laid. The 28th section of that statute
 “ enacts, ‘ That the provisions of the said act of the
 “ ‘ 59 Geo. III., by which it is directed that certain
 “ ‘ actions be remitted to the Jury Court, but that,
 “ ‘ previous to their being so remitted to the Jury
 “ ‘ Court, questions of law or relevancy may be raised,
 “ ‘ pleaded, and decided in the Court of Session, shall
 “ ‘ be and the same are hereby repealed.’ Now I beg
 “ you to observe, that this repealing clause refers to
 “ the 12th section of the act of 1819, and to the first
 “ part of that section. By this latter statute the first
 “ part of that section is expressly repealed, but the
 “ second part is not repealed. The repeal is confined
 “ to that part of the section which refers to remitting
 “ cases on questions of law or relevancy alone. Now,
 “ when one part of a section is expressly repealed, and
 “ the part immediately following is not repealed, it
 “ follows that the intention of the legislature was not
 “ to repeal that second part. I have not considered
 “ that part of the 6th Geo. IV. referred to by the Lord
 “ Justice Clerk, as it is not in the printed papers, and
 “ I was led to believe that all the sections which bore
 “ any reference to the question were contained in these
 “ printed papers. But I am of opinion, for the reasons
 “ already stated, that the Jury Court has the power of
 “ retransmitting such of the enumerated cases to the
 “ Court of Session as they think unfitted for jury trial.
 “ And there must be very few cases in which we would

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“ be called upon to exercise that power which the
“ English judges are so anxious to possess.”

Lord Cockburn.—“ This case is of vital importance to

“ the future condition of jury trial in civil causes in this
“ country. This mode of investigating facts was origi-
“ nally introduced with such caution, that no entire
“ cause was allowed to be sent for trial, but only such de-
“ tached issues as the Court of Session thought ‘ expe-
“ dient.’ If this had been deemed safe as an ultimate
“ system, there was no reason for altering this pro-
“ vision of the original act. But it was altered very
“ materially, and by a very marked step, in the very
“ next statute, which declares certain causes to be
“ proper for trial by jury; and, accordingly, enacts
“ that these shall be sent to the Jury Court for trial,
“ except in the single event (as I think) of there being
“ legal questions which, in the opinion of the Court of
“ Session, ought to be determined first. The third act
“ not only enlarged the description of these cases, but
“ took away the power, formerly given to this Court,
“ of abstaining from remitting, in order that supposed
“ questions of law or relevancy might be discussed here.
“ The fourth and last act confirms these cases, as ap-
“ propriate to trial, and makes it competent to fix the
“ facts, even of consistorial cases, by verdicts.

“ These statutes all demonstrate a steady and pro-
“ gressive confidence in the system of trial by jury, and
“ an increased tendency to have the character of the
“ cases that are to be so disposed of fixed by parlia-
“ ment. Accordingly, so far as I can discover, no
“ attempt has ever been made till now to get the Court
“ to exercise any discretion as to the fit application of
“ this system to any of those enumerated cases. When-

“ ever a case has been brought within the statutory
 “ description, it has always been understood that its
 “ course, in so far as the facts were concerned, was
 “ determined.

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“ But the doubt that has now been raised is,
 “ whether the statutes fix any cases whatever as
 “ cases of which the facts, if they are to be inves-
 “ tigated at all, must be investigated by juries. The
 “ doubt is, whether it be not competent for this Court
 “ to withdraw even the enumerated causes from trial,
 “ whenever it may happen to think trial inexpedient.

“ The plain result of this is, that it places the extent
 “ to which trial by jury is to be practised entirely in
 “ the discretion of the Court. It entitles every party
 “ to contest the fitness of his particular case for trial ;
 “ and justifies, and therefore tempts, a vexatious pre-
 “ liminary discussion on this subject, even in the clearest
 “ case of damages, such as that arising from injury
 “ to land where the title is not in question. Lords
 “ Ordinary, instead of being guided by general rules,
 “ which quiet the parties by their inflexibility, may
 “ order trials, or they may order unfathomable proofs
 “ by commission, according as their habits make them
 “ view the examination of given subjects familiarly or
 “ with dismay. And if a majority of the Judges in
 “ either Division should recur to the opinion which was
 “ held, at no great distance of time, by many most
 “ eminent lawyers, that trial by jury is beneficially
 “ applicable to no case whatever, the whole system
 “ might silently disappear.

“ I can find no ground for such a result in the
 “ statutes. Not that the 12th section of the act of
 “ 1819 is so clearly expressed as it might have been,
 “ if this doubt had been anticipated ; but that the

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“ pursuer’s construction, which tends to promote the
“ undoubted object of the legislature, and is therefore
“ the one to be favoured, is, to say the least, as satis-
“ factory as that of the defenders, which tends directly
“ to obstruct it.

“ The 59 Geo. III. cap. 35. sec. 1. not only specifies
“ what are to be held proper jury causes, but enacts,
“ that being so, they shall be sent at once to the
“ Jury Court for trial; and the Jury Court is not
“ merely authorized, but is imperatively required, ‘to
“ ‘settle an issue or issues, and to try the same by a
“ ‘jury.’ The two next sections seem to me to intro-
“ duce all the provisions that were thought necessary
“ for the disposal of questions of preliminary law or
“ relevancy in relation to these enumerated causes.
“ The import of them is, that such questions are to
“ be settled by this Court before the remit. But if
“ the case should pass this stage, and the remit be
“ made, I am inclined (though I admit that there has
“ been some practice against this) to think that these
“ questions could not afterwards be revived, but that
“ the province of the Jury Court consisted in merely
“ trying the case.

“ And when the first part of the 12th section em-
“ powers the Jury Court still to send the case back
“ for the discussion of such legal matter as should be
“ discovered in trying to settle an issue, it rather
“ appears to me that there is some ground for main-
“ taining that this only relates to the non-enumerated
“ cases. It relates to ‘the cases remitted to them as
“ ‘aforesaid;’ which words may, without any violence,
“ be applied so as to include, not the causes finally
“ disposed of by the three first sections, but those
“ immediately preceding the 12th clause; being all

“ those which, though not enumerated, it was competent for this Court or for the Admiralty to remit.
 “ It was not unreasonable to give more opportunities of discussing legal questions in these cases than in the enumerated ones, because they might be more complicated; which was the reason why they were put on the roll of the proper jury causes. However, this view is certainly not without difficulties.

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“ But, assuming that this first part of the 12th section embraces all cases whatever, the second part, which expressly relates only to causes to which jury trial is not ‘beneficially applicable,’ stands in a very different situation. The gates may be left very open for points of preliminary law, and yet shut very close against speculations as to the expediency of proofs by commission. It is said that the words, ‘in the course of settling an issue or issues,’ must be held to comprehend judicially the very same things in every part of the same clause. I am not aware of any necessity for such construction, where there are relative words which give the same expressions different meanings in different places even of the same section. We must give the statute the greatest amount of consistency that we can upon the whole.

“ Now, the attempt to extend this second part of the clause to the enumerated cases is met by two obstacles, both of which, to my mind, are unsurmountable:—1st, I cannot reconcile this construction with the previous positive enactment, that these enumerated cases are proper for trial by jury. To say that a case is ‘appropriate for jury trial,’ seems to me exactly to say, that it is a case to which jury trial is ‘beneficially applicable.’ Therefore the defendant’s construction makes the two parts of the act

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“ contradict each other. What the statute should have
“ enacted, according to them, is, that trial by jury was
“ beneficially applicable to no case whatever, unless
“ the Court of Session should think so. Their con-
“ struction makes the 12th section repeal the 1st.
“ 2dly, I cannot reconcile this construction with the
“ 13th section, which enacts, in express terms, (though
“ it be printed parenthetically,) that the Court has no
“ power to take proof by commission, by remit, or in
“ presentia, in the enumerated cases. I cannot believe
“ that the statute meant to exclude these modes of
“ proof from the enumerated cases, except on the
“ supposition that it meant that these cases should
“ positively have their facts investigated by jury; be-
“ cause, otherwise, it virtually debars them from being
“ investigated at all.

“ If the case, therefore, had depended on this sta-
“ tute alone, I should have held that, the cause being
“ on the catalogue of proper jury cases, and there
“ being no question of law, and the facts being dis-
“ puted, it was not in the power of the Court to pre-
“ vent a trial. But the matter is made clear by the
“ subsequent acts.

“ The 6 Geo. IV. cap. 120. enlarges the description
“ of appropriate jury causes, and compels this Court to
“ send them forward for trial without waiting to dis-
“ cuss any legal question. But due provision is made
“ for the disposal of such matter, by a clause which
“ was not noticed at the bar, but seems to me to be
“ decisive. It is the 33d, which introduces a totally
“ new set of regulations upon this subject. Its sub-
“ stance is, that when any legal question, proper to be
“ settled before trial, shall occur in the Jury Court,
“ that Court may either send back to the Court of

“ Session or not, as it shall think proper; and that, if
 “ sent back, the case shall proceed, quoad the law, as a
 “ Court of Session process. But this is only as to the
 “ law; it is as to ‘such question of law or relevancy.’
 “ There is no indication, but the reverse, of any inten-
 “ tion on the part of the legislature to retract its
 “ previous description of causes to which trial was
 “ beneficially applicable, and leave it to this Court to
 “ say to what causes it was appropriate. For the result
 “ in reference to the facts, as stated in the close of the
 “ section, is, that if, ‘after the determination of such
 “ ‘question, there shall remain matter of fact to be
 “ ‘ascertained between the parties, the said matter
 “ ‘shall be tried by jury, and the parties shall forth-
 “ ‘with proceed before the said Jury Court, or one of
 “ ‘the Judges thereof, to prepare an issue or issues
 “ ‘for trial.’ So that the case is taken from the Court
 “ of Session in the first instance, because it is held
 “ appropriate for trial; and when it is restored to this
 “ Court on account of emerging law, the authority of
 “ the Court is exhausted as soon as this law is cleared
 “ away, and the necessity for trial, if there be facts to
 “ be settled, revives.

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“ The act of 1830, which abolished the Jury Court,
 “ declares, that all causes which formerly behoved to
 “ be tried in that Court shall thenceforth be tried in
 “ the Court of Session. It does not enlarge the cata-
 “ logue of jury causes; but neither does it abridge it,
 “ or warrant any new mode of ascertaining their facts.
 “ It keeps up whatever necessity there was under the
 “ previous statute for trying facts by juries.

“ I do not consider the case of *Leslie*¹ as any autho-

¹ *Leslie v. Blackwood*, 3 Murray, 157.

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“ rity on the point now at issue. This precise point—
“ viz. of the competency of withholding a trial, on the
“ ground that a commission or a remit were more ex-
“ pedient—was not mooted there at all. Lord Gifford’s
“ speech, however, in *Lady Mary Crawford’s* case¹
“ satisfies me, that if that had been purely a claim for
“ damages he would have held a trial unavoidable.

“ Something has been said, and a good deal more
“ insinuated, with respect to the policy of the system
“ of compelling a court to try any cause by jury, to
“ which that court may think that trial by jury is not
“ beneficially applicable. This is plainly not a judicial
“ consideration. I shall only say, therefore, that if
“ this problem shall ever come before us, I anticipate
“ no difficulty in making up my own mind upon it.
“ Meanwhile, I feel no uneasiness in relying on the
“ experience of England, where there is no other way,
“ except by jury, in which the common law courts can
“ examine the facts, and where, nevertheless, there are
“ sufficient practical means for avoiding the trial of
“ really untriable cases.”

Lord Meadowbank.—“ Deeming it unnecessary, after
“ the judgments which have been delivered at so great
“ length, to occupy the time of the Court by going
“ over views of this question which have already been
“ fully explained, I shall only say that I have more
“ than once changed my mind in reference to the
“ question before us; but I am now decidedly of the
“ same opinion as the Lord President and Lord Justice
“ Clerk.”

Lord Mackenzie.—“ I have arrived at an opposite
“ conclusion. The question depends upon the mean-

¹ *Lady Mary L. Crawford v. Dixon*, 2 W. & S., 354.

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“ ing of the 12th clause of the act 59 Geo. III. The
 “ first question is, whether that section applies to the
 “ enumerated cases? It is said that it is wholly inap-
 “ plicable to the enumerated cases. Now, I have no
 “ difficulty upon this head. It is obvious that it refers
 “ to the enumerated cases, and it must have been in-
 “ tended to refer to them; for it is the only section
 “ which provides for the disposal of questions of law
 “ or relevancy after the case has been remitted to the
 “ Jury Court. Now, if a case came before the Jury
 “ Court, and if they found the summons grossly irre-
 “ gular, or the defences totally irrelevant, is it possible
 “ to hold that the Jury Court had no power to provide
 “ for the disposal of the question of relevancy, but that
 “ they must, in the face of these irregularities, go on
 “ to try the question of fact? Was there any such
 “ necessity imposed upon them? Can there be any
 “ doubt that the Jury Court have, over and over again,
 “ sent such cases back to the Court of Session, to have
 “ such questions disposed of? I can have no doubt that
 “ in so far the section applies to the enumerated cases.
 “ But look at the words of the section. It provides
 “ for the disposal of questions of law arising ‘ in the
 “ ‘ course of settling an issue or issues in the cases
 “ ‘ remitted to them as aforesaid.’ Now, are these
 “ enumerated cases not just those remitted as aforesaid
 “ for the preparation of an issue or issues in the Jury
 “ Court? I have, therefore, no doubt as to the ap-
 “ plication of that part of the section. Then the
 “ same section goes on to provide other powers to the
 “ Jury Court, and in the very same words, without the
 “ slightest hint of change in reference to the subject of
 “ the enactment. It provides, ‘ That it shall be com-
 “ ‘ petent for the Jury Court, when it appears to the

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“ ‘ said Court, in the course of settling an issue or
 “ ‘ issues, that a case turns upon matter of complicated
 “ ‘ accounts, or other matter to which trial by jury is
 “ ‘ not beneficially applicable, to remit the whole pro-
 “ ‘ cess and productions as aforesaid.’ Are not these
 “ words applicable generally to all classes of cases?
 “ May it not appear, in some of the enumerated cases,
 “ that the question turns upon a matter of complicated
 “ accounting? It is well known that actions of damages
 “ may involve the most complex questions of account-
 “ ing, and questions as to which trial by jury cannot
 “ be held to be beneficially applicable. I am willing
 “ to take the words ‘ beneficially applicable’ in their
 “ strictest sense. They ought to be taken so. It was
 “ never meant to contend that the Court should have
 “ the power of sending back every case to which they
 “ thought another form of trial would be more benefi-
 “ cially applicable than trial by jury. Whenever they
 “ exercised the power of remitting, they were bound to
 “ say, before sending back the process, that this is a case
 “ consisting entirely of complicated accounting, or that
 “ this is a case in which trial by jury would be abor-
 “ tive, utterly unavailing, and inconsistent with the
 “ ends of justice. Now, where is the absurdity of con-
 “ ferring such a power as this on the Jury Court? At
 “ the date of the enactment it was a separate Court.
 “ There was then no room for such extreme jealousy
 “ as to the feeling of the Court of Session against jury
 “ trial; but certainly there was no room for such jea-
 “ lousy towards the Jury Court, which would naturally
 “ be inclined to extend, rather than abridge, its own
 “ jurisdiction. I therefore see no difficulty in holding
 “ that the section confers the power upon the Jury
 “ Court contended for.

“ Then, with regard to section 13th, I think that it
 “ has no application to the present question. If it had
 “ not contained the saving clause, would it not have
 “ been inconsistent with the previous provisions of the
 “ act? Would it not have been said that the section
 “ contained nothing to prevent the Court of Session
 “ from disposing of the enumerated cases, whenever
 “ they pleased, by proof on commission? But what
 “ does the clause save? Just the regulations of the act,
 “ by which it is provided that such cases shall go to
 “ the Jury Court, there to be disposed of. It never
 “ can be interpreted as taking away the powers of the
 “ Jury Court. It never could be interpreted as taking
 “ away their power of remitting such cases to the
 “ Court of Session, when they thought them unfitted
 “ for jury trial.

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“ If, then, this power existed in the Jury Court in
 “ 1819, was it taken away by the subsequent act of
 “ 6 Geo. IV.? I cannot see that it was so taken away.
 “ By that act it is provided, that the enumerated
 “ cases ‘ shall be held as causes appropriate to the Jury
 “ ‘ Court, and shall, for the purpose of being discussed
 “ ‘ and determined in that Court, be remitted at once
 “ ‘ to that Court.’ It is said that these expressions
 “ import that such cases must remain in the Jury
 “ Court, and must be in every point disposed of there.
 “ But that interpretation must be wrong; for the
 “ 33d section refers to half a dozen ways in which such
 “ cases may be remitted to the Court of Session.
 “ Therefore the expressions I have quoted must be
 “ taken *exceptis excipiendis*, and under these excep-
 “ tions amongst others which are contained in the
 “ previous act, and unrepealed. This 33d section
 “ provides, that when the parties shall agree as to the

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“ question of fact, then the case shall be remitted to
 “ the Court of Session. It then provides, that even
 “ when they do not agree as to the question of fact,
 “ if any question of law or relevancy occur, then the
 “ case shall be remitted to the Court of Session. Now,
 “ it follows, that if this question of law or relevancy is
 “ to be decisive of the cause, then the whole case must
 “ be concluded in the Court of Session. Suppose such
 “ a question of relevancy to arise as, whether the sum-
 “ mons was irregular and inconclusive, or whether the
 “ defences were irrelevant, would it not be competent
 “ to the Court of Session to dismiss the action, or to
 “ find the defence alleged insufficient, and thus to
 “ ‘ discuss and determine,’ in the Court of Session, one
 “ of those very cases as to which it is declared that
 “ they shall be discussed and determined in the Jury
 “ Court? It is therefore quite plain, from this sec-
 “ tion, that the other clause which I have quoted
 “ admits of exceptions; and if it does, why should it
 “ not admit of the exception of powers previously con-
 “ ferred and unrepealed? This 33d section has been
 “ referred to by Lord Cockburn as containing an
 “ exhaustive statement of all the powers conferred
 “ upon the Jury Court as to the disposal of these enu-
 “ merated cases. But I cannot hold this to be the
 “ case, when I look to the terms of section 28th, in
 “ which it is declared to be expedient ‘ to repeal, vary,
 “ ‘ and amend the previous enactments as to trial by
 “ ‘ jury in civil causes;’ and to make other provisions
 “ for the further improvement of that mode of trial.
 “ So that it is not the object of the act to repeal all
 “ the powers previously vested in the Jury Court by
 “ the earlier statutes; it is an act passed to ‘ vary and
 “ ‘ amend’ some of them, and of course to leave some

“ of them untouched. Accordingly, it has just done
 “ so. It has left some of the powers unrepealed, among
 “ which, I think, are the powers conferred by this
 “ 12th section of the previous act. In the first place, let
 “ us consider, what does this 6 Geo. IV. repeal? I do not
 “ think it repeals any of the powers of the Jury Court.
 “ The powers it repeals are those of the Court of
 “ Session, as to the disposal of questions of law and
 “ relevancy occurring in the enumerated cases, before
 “ remitting them to the Jury Court. These are the
 “ only powers it repeals. It then proceeds to vary and
 “ amend the powers of the Jury Court in section 33d;
 “ but it takes no notice of the provision of this sec-
 “ tion 12th, just because it intended these provisions
 “ to remain as they were. Therefore, I think that at
 “ this time the power still remained to the Jury Court
 “ of remitting such cases as appeared unfit for trial by
 “ jury to the Court of Session; and if it then re-
 “ mained, it must still remain after the union of the
 “ Courts. Whether it was wise or not to unite the
 “ Courts, I do not know. But have we heard any thing
 “ to lead us to doubt that the same powers remain
 “ since the union of the Courts as the Courts sepa-
 “ rately possessed before?

“ This power has never yet been exercised, not be-
 “ cause it was thought by the Court or by practitioners
 “ not to exist, but because no cases have occurred in
 “ which the necessity has arisen for exercising it; and
 “ I have no doubt, that if we find in favour of the
 “ abstract question of power, we may never see a case
 “ again, for many years, in which the power would
 “ require to be exercised.”

Lord Corehouse.—“ The question under considera-
 “ tion is of great consequence to the due administration

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“ of justice by the method of jury trial. After all the
“ consideration which it has received, I retain the
“ opinion which I always held, that it is competent to
“ remit a cause, though one of the enumerated actions,
“ from the jury roll to the common roll of other causes
“ depending in the Court of Session. I shall shortly
“ state the grounds of that opinion, but not without
“ diffidence, when I see that they are opposed to the
“ views of your Lordship and others of my brethren;
“ to whom so much deference is due.

“ The question is not, whether the form of jury trial
“ is beneficially applicable to the individual case before
“ us; it is the abstract question, whether it is compe-
“ tent for us in any action, and under any circum-
“ stances, to retransmit one of the enumerated actions
“ from the jury roll, on the ground that trial by jury
“ is not beneficially applicable to such action?

“ In judicial procedure, causes may occur, and per-
“ haps not rarely, which are not fitted for this mode
“ of trial. An action may be raised which may either
“ involve complicated accounts, or a great and intricate
“ mass of documentary evidence, or questions of
“ abstruse science. The merits of such an action may
“ be altogether unsusceptible of adequate explanation
“ to a judge and a jury during the period of a jury
“ trial. And if it were necessary to confirm the
“ position that there are such causes, I would refer to
“ the terms of the statute 59 Geo. III. cap. 35. itself,
“ as a declaration by the legislature that there are
“ causes to which jury trial is not beneficially appli-
“ cable, as it has expressly recognised their existence,
“ and given directions for disposing of them.

“ But if there be such causes it must next be
“ examined whether they may occur among the enume-

“ rated actions as well as among the non-enumerated;
 “ And I have no doubt that they may; and not only
 “ so, but that actions to which jury trial is not bene-
 “ ficially applicable will sometimes be so shaped as to
 “ fall within the enumerated class, for the express
 “ purpose of perplexing a jury, if this Court shall
 “ determine that it has no power to interpose in any
 “ circumstances, and prevent an action, if of the enu-
 “ merated class, from being tried by jury. There is
 “ no difficulty in figuring actions, among the enumerated
 “ class, to which jury trial may not be beneficially
 “ applicable. Suppose, for example, that a merchant
 “ has dismissed a clerk, alleging that he kept irregular
 “ books, and embezzled money; that the clerk raised
 “ an action of damages for defamation; and that the
 “ merchant pleaded the veritas convicii. It may be
 “ necessary, in trying the action, to go into the ac-
 “ counts of the mercantile concern for ten or twenty
 “ years back; and must all this be done before a
 “ jury? Or suppose that trustees are accused of
 “ embezzling trust funds, that they deny the allegation,
 “ and plead that their accounts exhibit a full and fair
 “ state of their whole intrusions, and prove that
 “ there has been no embezzlement. It is evident that
 “ a mass of accounts may be requisite for such an
 “ action, which might be very ill suited for the arbitra-
 “ tion of a jury. And there are other actions, such as
 “ those relating to the alleged infringement of patents,
 “ and many more which might be mentioned. Among
 “ all which, though there might be some, and even a
 “ majority, which were well fitted for trial by jury,
 “ there might evidently be others which were not
 “ fitted for being so tried. I am satisfied that among
 “ the enumerated actions there may be some of which

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“ it would be found, in terms of 59 Geo. III. cap. 35.
 “ sec. 12., that they ‘ turn upon matter of complicated
 “ ‘ accounts, or other matter to which trial by jury is
 “ ‘ not beneficially applicable.’ And if there may be
 “ any such causes, that is enough to support my
 “ present argument; because it must not be forgotten,
 “ that to subject any one cause whatever to a form of
 “ trial which is not beneficially applicable to it is to
 “ inflict a grievous injury upon the parties concerned
 “ in such action, and is nearly tantamount to a denial
 “ of justice to them. It is not lightly to be presumed,
 “ that the legislature has passed an enactment leading
 “ to this result, which, however, I fear it has done, if it
 “ has taken away all discretionary power from this
 “ Court, and made it imperative on us to try every one
 “ of the enumerated actions before a jury, whether such
 “ a mode of trial be beneficially applicable to it or not.
 “ But if the statute be imperative and unambiguous in
 “ so enacting, we, of course, are bound to give effect to
 “ it. I shall immediately state the grounds on which
 “ I think the statute is not to be so construed; but I
 “ may notice, in passing, a suggestion which has been
 “ thrown out, that if this Court sustained the com-
 “ petency of its jurisdiction to withdraw any of the
 “ enumerated actions from the jury trial, there would
 “ result a practical evil from the risk of a too frequent
 “ retransmission of causes from the jury roll, and a
 “ consequent narrowing of the beneficial operation of
 “ jury trial. I believe this apprehension, even if it could
 “ have any weight in determining the construction of
 “ a statute, to be altogether without foundation. Any
 “ prejudices which may formerly have existed against
 “ jury trial are now removed so completely, that I
 “ believe there is as little hazard that any of the Lords

“ Ordinary, or either of the Divisions of this Court,
 “ should unwarrantably exclude causes from jury trial,
 “ if fit to be so tried, as there formerly was that such
 “ a course should have been taken by the Lord Chief
 “ Commissioner whilst he presided in the Jury Court
 “ when it was a separate Court. I am satisfied that if
 “ any attempt should be made improperly to withdraw
 “ a cause from trial by jury, which was fitted for that
 “ mode of trial, such attempt would at once be put
 “ down by any Lord Ordinary before whom it was
 “ made.

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“ I should therefore consider it a subject of much
 “ regret if the discretionary power of this Court did
 “ not extend to the enumerated as well as the non-
 “ enumerated actions. And I shall now state shortly
 “ what I consider to be the true construction of the
 “ statutes affecting the question.

“ The pursuer appears chiefly to argue, that the
 “ three first sections of 59 Geo. III. cap. 35. refer
 “ exclusively to the enumerated causes; that the next
 “ eight sections refer exclusively to non-enumerated
 “ causes; and that the 12th section is merely a part
 “ of this last series of clauses, and is limited to non-
 “ enumerated actions only. I own that I see no
 “ ground whatever for holding that opinion. The
 “ words of the section afford no warrant for it. With
 “ regard to the first clause of the section, the words
 “ are, ‘ That it shall be competent for the Jury Court,
 “ ‘ when it appears to the said Court, in the course of
 “ ‘ settling an issue or issues, or at any time before
 “ ‘ trial, in the cases remitted to them as aforesaid,
 “ ‘ that there is a question or questions of law or
 “ ‘ relevancy which ought to be previously decided, to
 “ ‘ remit back the whole process,’ &c. I am at a loss

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“ to find any thing in these words which restrict the
“ application of the power of retransmission to one
“ class of causes more than another. They apply to
“ all the cases remitted to the Jury Court as aforesaid,
“ and therefore to the enumerated as well as the non-
“ enumerated actions, both of which are so remitted.
“ I conceive that there are several decisions which
“ support this construction of the clause. In *Leslie v.*
“ *Blackwood*¹, one of the enumerated cases, a motion
“ was made to remit a cause from the Jury Court to
“ the Court of Session, because a question of law
“ occurred which ought to be settled previously to
“ trial by jury. That motion was indeed refused, but
“ it was not refused on the competency; it was
“ entertained as competent, and was refused because
“ ill-founded on the merits.

“ Again, in the case of *Allan*, 1822², which also was
“ one of the enumerated actions, a motion was made in
“ the Jury Court to retransmit it to the Court of Session
“ for the determination of a question of law. The motion
“ failed; but the Lord Chief Commissioner, in disposing
“ of it, laid it down explicitly, that it would have been
“ competent to grant the motion had it been well-founded
“ on the merits. And in another case in 1823, which
“ was an action for damages only, indisputably one of the
“ enumerated actions, a motion was made to retrans-
“ mit the action to the Court of Session, in order to
“ have a question of law determined. I was of counsel
“ in that cause, and the motion was granted, and the
“ cause was retransmitted; after which, the Lord
“ Ordinary sustained the defences, and assoilized from
“ the action. The Inner House adhered to this judg-

¹ 3 Murray, 157.

² *Allan v. Thomson*, 3 Murray, 1.

“ ment, so that the cause thus retransmitted was finally
 “ disposed of in the Court of Session.¹

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“ I consider, therefore, both on principle and
 “ authority, that the words of the first clause in section
 “ 12th apply to enumerated as well as non-enumerated
 “ causes. And where is the distinction between these
 “ words and the words of the last clause in that section ?
 “ The last clause is in these terms:—‘ That it shall be
 “ ‘ competent for the Jury Court, when it appears to the
 “ ‘ said Court, in the course of settling an issue or issues,
 “ ‘ that a case turns upon matter of complicated accounts,
 “ ‘ or other matter to which trial by jury is not benefi-
 “ ‘ cially applicable, to remit back the whole process,’ &c.

“ On perusing these words, I can discover no dis-
 “ tinction, either express or implied, between them and
 “ those in the first clause of the section. If the first
 “ clause extends both to enumerated and non-enum-
 “ rated actions, I think the last clause must necessarily
 “ apply to both of these classes of actions also.

“ But it is said, that even if this would otherwise
 “ have been the just construction of section 12, it is no
 “ longer so when reference is had to section 13. I do
 “ not feel moved by this argument. That latter
 “ section had a different and perfectly legitimate
 “ object in view without producing any alteration on
 “ the import of section 12. It was necessary, in regard
 “ to the disposal of non-enumerated causes, and it affects
 “ them only. But I shall not go more fully into this
 “ point, as it has been well explained in some of the
 “ opinions already delivered.

“ But the pursuer has farther pleaded, that by
 “ 6 Geo. IV. cap. 120. sec. 28. a new enumeration of

¹ Supposed—*Forbes v. Alison*, 2 S. & D., p. 169. (new ed. 152.)

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“ causes was made ; and it was declared, that ‘ all these
 “ ‘ shall be held as causes appropriate to the Jury
 “ ‘ Court ; and shall, for the purpose of being discussed
 “ ‘ and determined in that Court, be remitted at once
 “ ‘ to that Court,’ in manner therein mentioned. It is
 “ said that this is an imperative enactment,—that all
 “ such causes, when transmitted to the Jury Court,
 “ must be discussed and finally determined in that
 “ Court before a jury. But it will be observed, that
 “ the statute thus founded upon does not repeal or
 “ alter the statute 59 Geo. III. cap. 35., excepting to
 “ a partial extent, which in itself is, by implication, a
 “ confirmation of those parts of the statute which are
 “ not repealed or altered. And, in deciding on the
 “ question, whether the general words which I have
 “ just quoted have the effect of abolishing the particular
 “ power expressly conferred by 59 Geo. III. cap. 35.
 “ sec. 12. of retransmitting both enumerated and non-
 “ enumerated actions from the Jury Court to the Court
 “ of Session, there is one fundamental rule of construc-
 “ tion which must be carefully kept in view. If, in the
 “ same statute, a particular thing is expressly given in
 “ one part of it, it is not held to be taken away by sub-
 “ sequent general words ; and, in like manner, in par-
 “ tially repealing the prior statute, 59 Geo. III. cap. 35.,
 “ general words are not to be extended to take away
 “ what was particularly granted in that statute, and is
 “ not particularly repealed. Both in reference to this
 “ rule of construction, and from a consideration of the
 “ respective sections, I am of opinion that the power of
 “ retransmitting enumerated causes, as given by
 “ 59 Geo. III. cap. 35. sec. 12., was not abolished by
 “ 6 Geo. IV. cap. 120. sec. 28.

“ It has however been farther pleaded by the

“ pursuer, that by 11 Geo. IV. and 1 Will. IV. cap. 69.
 “ section 2. a provision is made, which is decisive
 “ of this question in his favour. It is there enacted,
 “ undoubtedly, that ‘all causes and issues which, if
 “ ‘they had occurred before the passing of this act,
 “ ‘must by law have been tried by jury in the Jury
 “ ‘Court, shall be tried by jury in the Court of
 “ ‘Session.’ But this provision just leaves the matter
 “ where it stood before. The question remains, what
 “ were the causes which, prior to this act, must ‘have
 “ ‘been tried by jury in the Jury Court?’ These
 “ were the enumerated actions, but under such limita-
 “ tions as were applicable to that class of actions.
 “ These limitations were neither enlarged nor narrowed
 “ by the act in question; and the point now at issue
 “ must be decided exactly in the same manner, and as
 “ if these acts had never passed.

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“ On considering these various statutes, I am of
 “ opinion that it is not imperative on this Court, in each
 “ and every one of the enumerated actions, to send it to
 “ trial before a jury, if it appears to be one to which
 “ trial by jury is not beneficially applicable. It is true
 “ that there may be few instances among the enume-
 “ rated actions in which jury trial should not be
 “ resorted to; and I hope that every year the facility
 “ of trying causes by jury will increase, so as to extend
 “ the beneficial application of that mode of trial more
 “ and more. The institution of jury trial is one for
 “ which I, and I am sure all of us, feel much admira-
 “ tion; and I consider it to be of advantage to that
 “ institution, as well as to the general administration of
 “ justice, if the construction of the statutes, which
 “ appears to me to be the true one, shall receive the

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“ sanction of the Court. . If the opposite construction
“ be adopted, I apprehend it will have the unfortunate
“ tendency to bring jury trial into some disrepute, by
“ rendering it occasionally the instrument of injustice,
“ in consequence of its being resorted to in causes to
“ which it is not beneficially applicable.”

Lord Jeffrey.—“ The Court being so unfortunately
“ divided upon ~~this~~ question, it is important that all
“ the views by which any of the judges are led to form
“ an opinion should be brought before the Court. I
“ shall therefore state shortly what has occurred to me
“ in reference to the question. I have wavered a good
“ deal in forming my opinion; but at last I agree
“ pretty clearly with those who hold that the Court
“ has no power of retransmission. I do not mean to
“ repeat the arguments which have already been so
“ ably urged, but merely to throw out a remark or two
“ as to the phrasology of these enactments.

“ I fully adopt the canon of Lord Corehouse;
“ although I draw a different inference from it,—that
“ when a provision is distinctly made in one portion of
“ a statute it cannot be held repealed by general words
“ occurring afterwards. But it appears to me that the
“ leading provision in the act of 1819 is contained in
“ the first section, by which the Court is authorized
“ and required to try the enumerated cases by a jury:
“ This is the general rule. According to the modern
“ phraseology of statutes, if it had been intended that
“ this rule should be subject to exception, the section
“ would have contained some such words as ‘except as
“ ‘herein-after excepted.’ I do not mean to say that
“ such words were absolutely requisite to render valid
“ any subsequent express exceptions contained in the

“ act; but, considering the unqualified statement of
 “ the general rule in the first section, I think that, if
 “ section 12 has been rightly interpreted by the defen-
 “ ders, these words should either have been in the first,
 “ or there should have been added to the provisions of
 “ section 12, some such words as ‘ any thing herein-
 “ ‘ before contained to the contrary notwithstanding.’

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“ In this statute no doubt some sections contain the
 “ restrictive words, ‘ other than the actions for damages
 “ ‘ herein-before enumerated ;’ but they do not do so
 “ always, even when such restriction is confessedly in-
 “ tended. In the 6th section, for instance, which quite
 “ plainly refers to the non-enumerated cases only, the
 “ words are perfectly general. It therefore follows,
 “ that the omission of these restrictive words in the
 “ 12th section by no means furnishes a conclusive ground
 “ for holding that that section refers to all cases with-
 “ out restriction.

“ But the construction of the 12th section, con-
 “ sidered as a whole, is what has puzzled me most. My
 “ interpretation of it would be much facilitated if I
 “ could think that no portion of it referred to the enu-
 “ merated cases; but I cannot doubt that the first
 “ portion of it does contain a provision applicable to
 “ these cases as well as others. The difficulty, then,
 “ with the importance of which I am much impressed,
 “ is, how are you to make a distinction between the
 “ two branches of this one section, and hold them ap-
 “ plicable to two distinct classes of cases? But you
 “ will observe, that although it is one section it is not
 “ one sentence. In the substance and object of the
 “ several provisions, the two branches are perfectly dis-
 “ tinct. The one provides for the disposal of questions

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“ of law or relevancy; and the other provides for the
“ disposal of questions of complicated accounting, and
“ others to which jury trial may not be thought benefi-
“ cially applicable. It appears to me that this last
“ clause hangs entirely by itself, and may be considered
“ as if it had been introduced under a separate number,
“ and with a separate title. If it imports a power to
“ try the enumerated cases otherwise than by jury,
“ it really amounts to an abrogation of the provisions
“ of the first section, and that by implication only;
“ while it certainly does not contain the words requisite
“ to show that it was intended to qualify that section,
“ such as ‘any thing herein-before contained to the
“ ‘contrary notwithstanding.’

“ Then the 13th section renders the interpretation
“ of the defenders still more difficult to be adopted.
“ To crush it to their meaning many more words would
“ require to be interpolated than the opposite construc-
“ tion requires to be understood in section 12; it being
“ manifest that, in order to restrain the total exception
“ of the enumerated cases which now stands in section
“ 13, it would have been necessary to introduce such
“ words as these—‘where such have not been retrans-
“ ‘mitted, as not beneficially fitted for trial by jury.’ I
“ do think, therefore, that the expressions contained in
“ the first section after the enumeration, viz. that the
“ Court is authorized and required to try all such cases
“ by a jury, amounts to a statutory declaration that to
“ all such cases jury trial is beneficially applicable. And
“ therefore I hold that nothing except a clear retracta-
“ tion of that declaration would allow us to qualify it.
“ With regard to the 33d section of 6 Geo. IV., from
“ which Lords Corehouse and Mackenzie have argued

“ that that act does not repeal the provisions of the
 “ previous one, I would make a single remark. No
 “ doubt, that act does not entirely repeal the previous
 “ one; several provisions in it are only varied and
 “ amended. I think the only part directly repealed is
 “ that contained in the 2d and 3d sections. But does
 “ not section 33d vary and amend the provisions con-
 “ tained in the 12th section of the previous act? It
 “ provides, in the first place, a totally new set of regu-
 “ lations with reference to the disposal of questions of
 “ law or relevancy occurring in the Jury Court. It
 “ provides, farther, that where parties, by mutual ad-
 “ missions, come to one upon the facts of the case, it
 “ shall be remitted to the Court of Session. It then
 “ provides, that if parties agree that a question of law
 “ or relevancy should be disposed of before going to
 “ trial, then the case shall be remitted to the Court of
 “ Session for that purpose: and it farther provides,
 “ that if one of the parties moves to have such a ques-
 “ tion of law or relevancy remitted to the Court of
 “ Session, and is opposed in his motion, it shall be
 “ competent to the Jury Court to grant or refuse it as
 “ they see fit. All these are variations of the powers
 “ previously conferred by the first part of the 12th sec-
 “ tion of 6 Geo. IV. But what is the close of the whole
 “ of this new form of process? At the end of the 33d
 “ section it is provided, that after all these questions
 “ of law or relevancy are disposed of, ‘ if there shall
 “ ‘ remain matter of fact to be ascertained between the
 “ ‘ parties, the said matter shall be tried by jury.’
 “ These expressions correspond with the leading words
 “ of the previous enactment. I think, therefore, that
 “ the new act repeals the powers conferred upon the

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“ Court of Session by the old act of deciding questions
“ of law or relevancy in the enumerated cases, before
“ remitting them to the Jury Court; and it improves,
“ extends, and renders more complete the former code
“ of regulations as to the powers of the Jury Court to
“ remit such questions of law or relevancy to be tried
“ by the Court of Session; and it then adds, that in
“ all those cases any matters of fact which may remain
“ shall be tried by a jury. Now, is it to be said that
“ you are, without absolute necessity, to control these
“ strong expressions, so similar to the leading enact-
“ ment in the previous statute, and in such striking
“ conformity with the whole scheme and object of the
“ legislature, which obviously was to do away with
“ proofs on commission in the enumerated cases? And
“ can you do so without endangering, I mean theoreti-
“ cally, the whole system of jury trial as established in
“ Scotland?

“ With regard to the argument of Lord Gillies,
“ founded upon the deficiency of powers said to have
“ been felt in the courts of England, I would just say
“ that I think we have already got the very powers
“ which they wished to get. In England all cases in-
“ volving matter of fact, arising in the Courts of com-
“ mon law, must be tried by jury; and the Judges
“ there, therefore, were anxious to possess the power
“ of disposing otherwise of such cases as were in their
“ nature unfitted for jury trial. Now, we already have
“ such a power; we may try all cases, except the
“ enumerated cases, in the Court of Session; and all
“ that can be said with reference to this argument is,
“ that we already have all the powers which the Eng-
“ lish Courts wanted to have, which they were not

“ allowed to have, and yet without which the system in
 “ England works well. As to having a class of cases
 “ subjected in this respect to a discretionary power, I
 “ would say that it is better for all parties to have the
 “ line chalked out by parliament within which that
 “ discretionary power is to be exercised. The restric-
 “ tion thus imposed is not unwholesome. It is not a
 “ great evil that, in a very few cases, after an attempt
 “ has been made to try them by jury, that method of
 “ trial may be found inexpedient. And the remedy is
 “ not very desperate. Few parties would be inclined
 “ to insist on having questions tried by jury, contrary
 “ to the persuasion of the Judge, and with the good
 “ sense of their own counsel to guide them.”

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Lord Moncreiff.—“ I concur entirely in the opinion
 “ of Lord Gillies; and the grounds upon which I have
 “ formed my opinion have been so clearly and fully
 “ explained by Lord Corehouse that I do not intend
 “ to trouble you with many remarks. I was prepared
 “ to state fully the views which I entertain of the
 “ question; but that is now unnecessary. In con-
 “ sidering the question, we have to keep two points
 “ steadily in view: 1st, that we are called upon to give
 “ our judicial opinions upon a pure question of compe-
 “ tency; as to whether it would be better that the law
 “ should have stood the one way or the other, we have
 “ no right to inquire; and, 2dly, that in construing a
 “ statute judicially it is not to be assumed that the
 “ legislature proceeded on the idea that any Judge in
 “ any Court would not do his duty faithfully.

“ If the question were, whether any great number of
 “ these enumerated cases ought to be remitted to the
 “ Court of Session, I should say that very few indeed

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“ would require to be so disposed of. Nay, if even in
 “ this very case the question were, whether, the point
 “ of competency being decided, it ought to be remitted
 “ to the Court of Session, I should have very great
 “ doubts of the propriety of doing so without the con-
 “ sent of all parties. But the only question before us
 “ is that of competency; it is simply, whether, when
 “ a Lord Ordinary in such a cause, acting as the Jury
 “ Court formerly did, doubts whether or not a particu-
 “ lar case is fitted for jury trial, he may remit it to the
 “ Court of Session to decide the question whether it is
 “ so or not. I am most decidedly of opinion, that the
 “ 12th section of the act 1819 applies to both classes of
 “ actions; and the only cause for hesitation which I
 “ have in forming that opinion is the respect which I
 “ feel for the opinions of so many of your Lordships
 “ who think differently. If the first clause of that
 “ section refers to both classes, I do not think that, by
 “ any rule of construction, it is possible to hold that the
 “ second does not also refer to both. Then, as to section
 “ 13, it was necessary to continue the former powers
 “ for the disposal of the non-enumerated cases, but it
 “ was not intended to affect any of the provisions with
 “ reference to the disposal of the enumerated cases,
 “ and therefore they were excepted. Neither do I
 “ think that by any of the subsequent acts the powers
 “ conferred upon the Jury Court by this 12th section
 “ have been taken away. The general expressions con-
 “ tained in the 28th section of 6 Geo. IV. are only to
 “ be understood sub modo, and in conformity with the
 “ other provisions established or left unrepealed by
 “ that act. Then, with regard to the 33d section, it
 “ only gives powers as to the disposal of questions of

“ law or relevancy; and then it provides, that when
 “ such questions are transmitted to the Court of Session
 “ that Court is bound, after having disposed of them,
 “ to remit the whole process back to the Jury Court
 “ as one of the enumerated cases. And therefore
 “ the last words of this section import no more than
 “ the former general provision, that all such cases
 “ shall be sent to the Jury Court, there to be disposed
 “ of. Then it is said, that in the 1 Will. IV. the
 “ legislature assumes that these cases must be tried by
 “ jury. No doubt of it; that remains the general
 “ rule for all such cases. But the question still
 “ remains, whether there is any thing in either of these
 “ acts which repeals the 12th section of the former
 “ act? I find nothing in them that can be held to have
 “ such an effect; and therefore, holding that that
 “ section clearly confers upon the Jury Court the power
 “ of retransmitting to the Court of Session such of the
 “ enumerated cases as may appear to them unfit for
 “ jury trial, I think we still possess these powers. The
 “ cases in which these powers will come to be exercised
 “ must, in my opinion, be very few; but the legislature
 “ clearly supposed that they might exist.”

Lord Fullerton.—“ In regard to the 12th section of
 “ the 59 Geo. III. I agree with Lord Jeffrey. I do
 “ not think that the first provision of that section can
 “ be held to be confined to what are termed the non-
 “ enumerated cases. There were obvious reasons for
 “ conferring a general power to retransmit emerging
 “ questions of law or relevancy, because, as in the
 “ great proportion of the enumerated cases the con-
 “ descendences and answers were given in in the Jury
 “ Court, such questions were not likely to be raised

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“ until after the case had been remitted from the
“ Court of Session.

“ But I do not think it necessarily follows that the
“ concluding part of the section, which is in expres-
“ sion a substantive enactment, must receive an equally
“ comprehensive construction; that will depend on
“ the true meaning of the terms employed in it. And,
“ on considering those terms with reference to those of
“ the first and leading enactment of the statute, it
“ would require some clearer and more unequivocal
“ declaration to satisfy me that by this section the
“ Jury Court were empowered to exercise a discretion
“ as to the beneficial application of jury trial in that
“ class of cases to which, by the clearest implication, the
“ leading enactment had declared it to be beneficially
“ applicable, and which it had expressly directed that
“ Court to try by a jury.

“ This opinion is confirmed by the section imme-
“ diately following, viz. the 13th. For though, from
“ its form of expression, it is not absolutely conclusive,
“ it is hardly possible that, if the 12th section had
“ contemplated the retransmission of any of the enume-
“ rated cases, for the purposes of a proof by commission,
“ or otherwise, the 13th would have contained such a
“ saving and excepting clause, without some expla-
“ nation or qualification.

“ Even if the question, then, had turned entirely on
“ the act of the 59 Geo. III. I should have been
“ inclined, though with great difficulty, to think that
“ the Jury Court had no power, in any of the enume-
“ rated cases, to retransmit on the particular ground
“ now under consideration.

“ But it does not appear to me to depend entirely on

“ that statute. We must look to the next, the
 “ 6 Geo. IV., and that, in my opinion, removes the
 “ difficulty.

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“ The purpose of it was to enact a body of regula-
 “ tions for the preparation of causes in the Court of
 “ Session, and for the ascertainment of facts in those
 “ cases in which the facts were disputed.

“ Even in that department of this last class of cases,
 “ which was not specially appropriated to the Jury
 “ Court, the provisions contained in it went far to
 “ supersede the 12th section of the 59 Geo. III.; for
 “ the 14th and 15th sections provide, first, for the case
 “ of the parties differing as to facts which do not
 “ require to be ascertained by jury trial, and, secondly,
 “ for that of the parties differing as to facts which do
 “ require to be ascertained by jury trial. The adoption
 “ of the different course of procedure respectively
 “ applicable to those cases is left by those clauses to
 “ the Lord Ordinary and the Court; and after that
 “ power had been exercised, by sending a case to the
 “ Jury Court, it is not easy to see how the Jury Court
 “ could have had the power to retransmit it, on the
 “ ground that they did not consider it one to which
 “ jury trial was beneficially applicable.

“ But the matter is still clearer in regard to the
 “ other or enumerated class of cases, which is by this
 “ statute extended much farther than by that of the
 “ 59 Geo. III. In the first place, it repeals expressly
 “ the whole provisions authorizing the remits of cer-
 “ tain cases from the Court of Session; and, secondly,
 “ it introduces a remit of a totally different kind, and
 “ founded on a different principle. After repealing the
 “ provisions of the 59 Geo. III. as to remits of the
 “ specified class of cases, it enacts that ‘ the following

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“ ‘ actions, whether originating in the Court of Session
“ ‘ or the Court of Admiralty, shall be held as causes
“ ‘ appropriate to the Jury Court, and shall, for the
“ ‘ purpose of being discussed and determined in that
“ ‘ Court, be remitted at once to that Court, in manner
“ ‘ herein-after to be directed;’ and the 29th section
“ points out the form in which this is to be done.

“ By these enactments an essential change was made
“ on the former system. The Jury Court being
“ declared to be the ‘appropriate Court’ for the class
“ of enumerated actions, in which these actions were to
“ be ‘discussed and determined,’ and the Court of
“ Session being called on at once, and without any
“ discretion, to remit these actions, it appears to me
“ that those actions were as completely fixed in the
“ Jury Court as if they had been brought into it by a
“ special writ for that purpose. In truth, in the enu-
“ merated cases the remit of the Court of Session
“ ceased, after that statute, to be any thing but the
“ formal instrument for passing the case to the ‘appro-
“ priate Court.’

“ Now, if the enactments had stopped here, I do not
“ see how the Jury Court could have had the power to
“ retransmit on any ground whatever. Having been
“ declared the ‘appropriate Court’ in which certain
“ actions were to be ‘discussed and determined,’ they
“ must have retained those cases till they were so
“ discussed and determined; and I do not see how
“ such cases could have found their way back to the
“ Court of Session, unless by the authorized proceedings
“ in error, by bills of exceptions, or otherwise, after
“ they were determined in the Jury Court.

“ But the enactments did not stop there. For the
“ 33d section points out the special circumstances in

“ which the Jury Court shall retransmit to the Court
 “ of Session; and, in particular, the manner in which
 “ questions of law or relevancy, emerging in the dis-
 “ cussion of the enumerated cases, shall be dealt with
 “ by the Jury Court; and it concludes with the
 “ positive direction, that if, after all the sifting of the
 “ case, ‘ there shall remain matter of fact to be ascer-
 “ ‘ tained between the parties, the said matter shall be
 “ ‘ tried by jury.’

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“ Combining this clause with the 28th, I think they
 “ necessarily constitute a repeal of all grounds of re-
 “ transmission by the Jury Court to the Court of
 “ Session, except those specified in the 33d section;
 “ and, at all events, they constitute a repeal of any
 “ powers, if they ever existed, to retransmit any of the
 “ enumerated cases to the Court of Session, in order
 “ that disputed facts in these cases might be ascertained
 “ in any form but by that of trial by jury. Upon this
 “ last matter the statute seems to me to be clear. In the
 “ first place, it declares that the enumerated cases shall
 “ be discussed and determined in the Jury Court, as
 “ the appropriate Court; secondly, it points out the
 “ special circumstances under which that appropriate
 “ Court shall retransmit to the Court of Session, in
 “ regard to questions of law or relevancy; and, thirdly,
 “ it directs that in all cases in which there ‘ remains
 “ ‘ matters of fact to be ascertained, they shall be tried
 “ ‘ by a jury.’ The consequence I draw is, that these
 “ enactments are absolutely exclusive of the power to
 “ retransmit any of the enumerated cases ‘ in which
 “ ‘ there remains matter of fact to be ascertained,’ in
 “ order that such matter of fact shall be determined,
 “ not by the appropriate Court, in the statutory form

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“ of trial by jury, but by the Court of Session, ~~on a~~
“ proof by commission.

“ Holding, then, that there was no power in the
“ Jury Court, while it subsisted, to withhold any of the
“ enumerated cases, in which there remained matter of
“ fact to be ascertained, from trial by jury, and it
“ being unquestionable that no different or higher
“ powers on the matter are now vested in the Court of
“ Session, I think the application incompetent.”

Lord Cuninghame.—“ Although I had formed an
“ opinion in favour of the competency of the motion,
“ yet now, after hearing the opinions which have been
“ delivered, I have come to entertain considerable
“ doubt on the question; and on the whole, consider-
“ ing that the Court is so nearly divided, and that I
“ have had the least experience among your Lordships,
“ as a Judge, I think myself justified in withdrawing,
“ and in declining to vote, on the ground of non
“ liquet.”

The Lord President.—“ It may be satisfactory to the
“ Court to learn, that the opinion of the Lord Chief
“ Commissioner is with the majority.”

The Court then pronounced this interlocutor:—
(10th March 1837.)—“ The Lords having heard
“ counsel in presence of the whole Court, and having
“ considered the different acts of parliament regarding
“ trial by jury in civil causes, and having particular
“ regard to the 12th and 13th sections of the act
“ 59 Geo. III. c. 35., are of opinion, and find and de-
“ clare accordingly, that in the cases enumerated in
“ the said acts as appropriated for trial by jury, where
“ the conclusion is for damages, they have no power
“ to take proofs by commission, on remit, or in pre-

"sentia, but must remit all such cases to be tried by
"jury."¹

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Marshall's Trustees and Lord Eglinton's Trustees presented petitions of appeal, which were objected to as incompetent; and the appeal committee having reported the matter to the House, their Lordships directed the question to be argued by one counsel on each side.²

Respondent (objecting to the appeal).—This is an action concluding for damages to lands where the title is not in question, and is thus one of those enumerated in the statute 59 Geo. III. cap. 35., and which are ordered to be tried by a jury. A power is reserved to the Court of Session, where any question of law arises to decide such a question; but where no such question arises (and here there is none), it is enacted by section 3d, that "the interlocutor of the Lord Ordinary
"ordering the cause to be remitted to the Jury Court,
"whether with or without a reservation of the alleged
"question of law, shall not be subject to review by
"representation, petition, appeal to the House of Lords,
"or otherwise;" and by section 15 it is expressly enacted, that all interlocutors "ordering a trial by
"jury" shall not be subject to appeal. The same class of actions are enumerated in the statute 6 Geo. IV. cap. 120. sec. 28. And in uniting the Jury Court with the Court of Session, the statute 1 Will. IV. cap. 69. sec. 16. enacts, that all the provisions of the therein recited acts (including the act of the 59 Geo. III.) shall remain

¹ 15 D., B., M., 784.

² The argument took place under the petition for Marshall's Trustees, it being arranged that the judgment on it should regulate the judgment on the petition of the Trustees of the Earl of Eglinton.

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in force in so far as not inconsistent with it; and the rule prohibiting appeals is not so.

Appellant (in answer).—“The right of appeal cannot be taken away by implication. The rule as to the incompetency of appeal under section 3d of the 59 Geo. III. applies to the act of remitting a case to the Jury Court, not to the question whether a trial by jury shall actually take place. That question can arise only at the time of settling the issues. Then the statute 6 Geo. IV. cap. 120. in part repeals that of the 59th of Geo. III., and no provision is made against an appeal. In this situation of matters the statute 1 Will. IV. abolished the original Jury Court, without making any explicit enactment on the subject. The question here is, whether the case shall be sent from one roll in the Court of Session to the other; and there is no prohibition against an appeal in such a case.

LORD CHANCELLOR.—My Lords, this is an application to dismiss an appeal, as not being competent from an order. The application was made (according to the petition) in these terms,—it being in a motion stated to have been made before the Lord Ordinary as in the Jury Court:—“That the cause should be remitted back
“ from the jury roll to the roll of the Court of Session,
“ in terms of the 12th section of the act 59 Geo. III.
“ cap. 35., on the ground that it was one to which,
“ from the nature of the case, and the technical and
“ scientific investigation on which it would depend,
“ jury trial would not be beneficially applicable.” The petition states, that the Lord Ordinary required the assistance of all the Judges; and it ended in the following order:—“The Lords having heard counsel
“ in presence of the whole Court, and having con-

“sidered the different acts of parliament regarding
 “trial by jury in civil causes, and having particular
 “regard to the 12th and 13th sections of the act
 “59 Geo. III. cap. 35., are of opinion, and find and
 “declare accordingly, that in the cases enumerated in
 “the said acts as appropriated for trial by jury, where
 “the conclusion is for damages, they have no power to
 “take proof by commission, on remit, or in presentia
 “but must remit all such cases to be tried by a jury.”

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My Lords, it is not disputed that the right of action in this case was one coming under the cases enumerated by the 59th of Geo. III. Those cases are also enumerated in the 6th of Geo. IV. cap. 120. sec. 28.; and it is admitted on all hands that the case in question was among those enumerated cases. The 1st section of the 59 Geo. III. provides, that in those cases the Lord Ordinary, without any discretion, shall send the case to the Jury Court. The application in question is made under the 12th section of that act. Then there is a series of sections, commencing with the 4th, providing, that in all cases not enumerated, as to which provision is made, the Lord Ordinary or the Court of Session may, if the case appears a fit case for the purpose, send it to be tried by the Jury Court. Then the 12th section provides, “that it shall be competent to the Jury Court, “when it appears to the said Court, in the course of “settling an issue, or at any time before trial, in the “cases remitted to them, that there is a question or “questions of law or relevancy which ought to be previously decided, to remit back the whole process and “productions to the Division of the Court of Session, “Lord Ordinary, or Judge Admiral, who remitted the “same to the Jury Court, that the question or ques-

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“ tions of law or relevancy may be considered and
“ determined there: Provided always, that it shall be
“ lawful to the said Division, Lord Ordinary, or Judge
“ Admiral, when matters of fact shall, after such con-
“ sideration or determination, remain to be proved,
“ again to remit the whole process and all the pro-
“ ductions to the Jury Court, that an issue or issues
“ may be prepared and tried as aforesaid.”

Now, it would be rather a singular provision, if, in the first instance, it were imperative on the Lord Ordinary to send one of the enumerated cases to be tried, against which order there can be no appeal; and yet, when it got to the Jury Court, and measures were being taken to send it before the Jury, it could be sent back to the Lord Ordinary or the Court of Session,—that there should be discretion in the Court whether to send it to the Jury or not. That, however, is an objection which would lie more to the order to which the appeal applies, than to the particular case now under your Lordships consideration.

The next section, however, the 13th, provides, “ that
“ nothing in this act contained shall extend or be
“ construed to extend to prevent the Court of Session,
“ in either of its Divisions, or the Lord Ordinary, (save
“ and except in the cases concluding for damages,
“ herein-before enumerated,) or the Judge Admiral,
“ unless otherwise instructed as aforesaid by the
“ Court of Session, to take proof on commission, by
“ remit, or in presentia, and thereafter disposing of the
“ cause in the manner now practised in such cases.”

Then the 15th section provides, “ that it shall not
“ be competent, by representation, reclaiming petition,
“ bill of advocacy, appeal to the House of Lords, or

“ otherwise, to bring under review any interlocutor by
 “ the said Divisions, Lords Ordinary, or Judges of the
 “ Admiralty, ordering a trial by jury.” So that the Lord
 Ordinary’s order, in the first instance, in the enumerated cases is final, unless arrangements are made for taking the opinion of the Court of Session in the cases not enumerated. The 15th section provides, that in all cases there shall be no appeal against an order directing the case to be tried by a jury, embracing the two classes of enumerated and non-enumerated cases. It is quite obvious that if this appeal be competent, means might have been found by which the provision of the statute would be evaded, inasmuch as parties might indirectly call upon your Lordships to decide whether or not the Court of Session or the Lord Ordinary had power to send the case to be tried by the Jury Court.

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The only part of the statute on which it is attempted to be shown that the present appeal is founded is the 12th section, which provides, that in certain cases applications may be made to the Jury Court to send a case back from the Jury Court to the Court of Session. That affords a strong reason for believing that if that case were now before your Lordships for decision that would apply, not to the enumerated, but to the non-enumerated cases; but it is quite clear, that under the provision in that section only the question now before your Lordships arises. It is a statutory provision, under which the application is to be made; and it is clear that the act of parliament which gives that power does not give a power of appeal. It is against the refusal of the application that the present appeal is presented.

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I shall observe presently on the terms of the order, to see whether there is any thing in the argument, that all those provisions are gone by the union of the two Courts,—a power of appeal being given by the statute, and no appeal given by the statute,—whether that would be a sufficient answer to the competency of this appeal.

Then it is said, however that might be before the statute of the 1st of William IV., the statute of 1st William IV. has altered the case, inasmuch as the Jury Court is merged in the Court of Session. That statute certainly has provided, that all those powers which had before that time been executed by the Jury Court should be in future executed by the Judges of the Court of Session; but it never could be supposed that the true construction of that act was to destroy all the machinery which the previous acts of parliament had established as the means by which it was to be ascertained what cases were to be tried by that Court, and what cases were to be tried by the Jury Court, and regulating the cases in which the one or the other course was to be adopted. There can be no doubt of that being the intention of the act, from the general nature of it; but the 16th section of that act appears to put an end to all discussion, for it enacts, “that all
“ the provisions of the foresaid recited acts now in
“ force, in so far as not inconsistent with this act, shall
“ be construed and remain in force until altered or
“ revoked by parliament; and that all rules and regu-
“ lations in observance in the Jury Court at the time
“ of the union of jury trial in civil cases with the
“ administration of justice in the Court of Session,
“ established and enforced by act of sederunt, shall

“ continue and be observed as rules and regulations
 “ applicable to the Court of Session after such union,
 “ until altered by competent authority, namely, the
 “ Court of Session in Scotland.” Then, if all the
 provisions of the former act are to remain in force, one
 of those provisions having left it in the discretion of
 the learned Judges whether a case should be tried by
 the Jury Court jurisdiction, or whether it might be
 disposed of by the Judges exercising their ancient
 jurisdiction, that provision applies as much to the
 proceedings subsequent to that act as it had done to
 the proceedings antecedent to it. The terms of the
 clause are explicit:—“ That all the provisions of the
 “ foresaid recited acts now in force, in so far as not
 “ inconsistent with this act, shall be continued and
 “ remain in force until altered or revoked by par-
 “ liament; and that all rules and regulations in
 “ observance in the Jury Court at the time of the
 “ union of jury trial in civil causes with the admini-
 “ stration of justice in the Court of Session, estab-
 “ lished and enforced by acts of sederunt, shall
 “ continue and be observed as rules and regulations
 “ applicable to the Court of Session after such union,
 “ until the same shall be altered by acts of sederunt.”

My Lords, it is quite obvious, I apprehend, that that
 act did not at all intend to alter the provisions with
 respect to the means by which the powers of the Court
 were to be put in operation; but that it was for the
 purpose of providing, that the jurisdiction exercised by
 the Jury Court should be exercised in future by the
 Court of Session, they discharging the duties of the
 jurisdiction separately, so as to carry into effect all the
 provisions of the prior acts. It appears to me, that, on

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a consideration of all the acts, there is in this case no power of appeal, and that the petition of appeal must be dismissed.

LORD BROUGHAM. — My Lords, I entirely agree in the conclusion to which my noble and learned friend has come to upon this subject. If the act of the first of the present King had been drawn with greater precision, and the manner of the transfer of the Jury Court to the Court of Session had been more distinct, it would have left no question at all in the present case. It is alone because that is not done with sufficient distinctness that the present question has arisen. If it had been said in that act (and we must take it as if it had been said), the Jury Court is to cease and determine from and after a certain day, as now constituted, —that is to say, as a separate Court, but that, nevertheless, the functions of the Jury Court shall hereafter —that is to say, after that shall have ceased and determined as a separate Court — continue to be performed by the Court of Session, then we should have the Court of Session acting in the separate capacities clearly laid down in the act, both as a Jury Court, and as the Court of Session. Then, if it acted in two separate capacities, both as a Jury Court and a Court of Session, the 12th section of the 59th of Geo. III., upon which, and upon which alone, the present application could be made, would have applied to it in both these capacities; and we should have read it:—It shall be competent to the Jury Court, when it shall appear to the said Court, in settling an issue or issues, that the matter turns on complicated accounts, to which trial by jury is not applicable, to remit both the whole process and productions, with their report thereon, in order that the

cause may be proceeded with in such manner as shall appear most expedient for the administration of justice. We should then have been enabled, more distinctly than we at present are, to read :—that it shall be competent for the Court of Session sitting as a Jury Court, to remit to the Court of Session sitting as a Court of Session, and to the Judge Admiral, in order that such Court may proceed in such way as may be requisite for the administration of justice. But I apprehend that must be taken to be the meaning of the 12th section, when coupled with the 1st, and particularly with the 16th section of the first of the present King. If that be so, it appears to me to put an end to all doubt, for this is, in that case, an appeal from an order of the Jury Court. The Jury Court, I take to be a mere creature of the statute; and unless an appeal is given by the act constituting that Court, no such appeal will lie. If the Court of Session, acting as a Court of Session, has, quasi Court of Session, any such jurisdiction, it is not necessary, for the present purpose, to argue that the appeal will not lie unless given by the statute. The separate existence of that Court is determined by the statute in the first of the present King. I therefore think that this appeal does not lie. And I have the less anxiety respecting the decision to which your Lordships are about to come upon this matter, because, after having attended to the arguments which the learned Judges advanced on both sides, after having attended to the arguments in the Court below, speaking with the greatest deference possible of all the learned Judges, I have come to a very strong opinion, I may say I have come to an unhesitating conviction, in favour of the opinion of the majority, that the jurisdiction

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in question does not apply to the enumerated, but only to the non-enumerated cases. At the same time it must be admitted it is very clear that among the enumerated cases may possibly arise, and not even possibly, but very probably, from time to time, cases where a jury trial would not be the most expedient and the most desirable mode of proceeding for the administration of justice; but the great bulk of the cases, the very great majority, almost all those cases, are such as are better adapted for trial by jury than the other cases which fall within the description of the 1st section of the one act, and the 28th section of the other. Those cases are much more likely to furnish instances of actions where it may be more advisable not to proceed by jury trial than to proceed by that mode of trial. The legislature appears to have drawn that distinction in the two clauses. A case may, by remote possibility, arise—and the present case may, by possibility, be one—in which the trial by jury would not be so advisable. I have formed my opinion upon the merits of the case, so far as I have been able to attend to it, and on a careful perusal of the opinions of the learned Judges below, and have no hesitation in joining in the opinion of my noble and learned friend advising your Lordships to dismiss this appeal.

The House of Lords ordered and adjudged, That the said appeal be dismissed this House, as incompetent, without costs.

DEANS and DUNLOP—ANDREW M'CRAE—RICHARDSON
and CONNELL, Solicitors.

[2d February 1898.]

Miss XAVERIA GLENDONWYN and JOHN NAPIER,
Assignee of Mrs. ISMENE GLENDONWYN or SCOTT,
Appellants. — *Dr. Lushington* — *Sir William Follett*.

DAME MARY LUCY ELIZABETH GLENDONWYN or GORDON,
Spouse of Sir JAMES GORDON, Bart., Respon-
dent. — *Attorney General (Campbell)* — *Shee*.

Discharge. — *Husband and wife.* — *Heritable or moveable.* — A wife conveyed her heritable estate to her husband on condition that he should make payment of all debts due by her, and of all provisions settled or to be settled by her on her children; she granted bonds of provision to her daughters, and one of them after her mother's death, on occasion of her marriage, granted a discharge in her marriage contract, in consideration of a tocher by her father, of all she could claim in right of her father or of her mother in any manner of way, and in full of every claim competent to her of all bairns' part of gear, legitim, portion natural, executry, and every thing else that she could ask and claim by and through the decease of her said father and mother: Held (affirming the judgment of the Court of Session) that the bond of provision was not included in the discharge.

WILLIAM GLENDONWYN, of Glendonwyn and Parton, 1st Division.
was married to Agnes Gordon, proprietrix of the Ld. Fullerton.
estate of Crogo, by whom he had three daughters, the

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GORDON. Glendonwyn, and Mrs. Ismene M. Glendonwyn or
2d Feb. 1838. Scott, wife of William Scott, Esq.

Mrs. Glendonwyn on the 29th March 1791 disposed the estate of Crogo to her husband, his heirs and assignees, reserving her own liferent, and "declaring that the said William Glendonwyn and his
"foresaids, by his or their acceptance of these presents, shall become liable in payment of all debts
"payable by me at the time of my decease, and of the
"provisions settled or to be settled by me upon my
"children." The obligation to infest was "subject
"to the reservation and declaration above written;" and sasine was taken accordingly. Shortly thereafter, Mrs. Glendonwyn, with consent of her husband, executed a bond of provision in favour of her three daughters, bearing to be "in exercise of the power reserved
"to me in a late disposition executed by me of my
"estate of Crogo, to and in favour of the said William
"Glendonwyn." By the bond she bound herself and her disponees to pay to the respondent, Lady Gordon, the sum of 1,250*l.*, to the appellant, Miss Glendonwyn, 1,500*l.*; and to Mrs. Scott 1,250*l.*, and that "within
"twelve months next after the longest liver of us
"two, me or my said husband, their father, with a
"fifth part of the principal sum of liquidate penalty
"in case of failure; together also with the due and
"ordinary annual rent of the said principal sum to
"each respectively, from and after the time of the
"decease of the longest liver of us two, me or my said
"husband, to the foresaid time of payment, and yearly,
"termly, and proportionally thereafter, until payment."

A power to alter was reserved; and it was declared, that during the life of their parents, the daughters should have no right to assign, and that, in the event of the decease of any of them, the share of the deceased should belong to the survivors. By a codicil, Mrs. Glendonwyn bound herself and her disponees to pay to the respondent the sum of 100*l.* sterling, in addition to the above provision—the payment to be at the same term, and bearing interest in the same way as the first provision of 1,250*l.*

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Mrs. Glendonwyn died in the course of the same year (1791).

In 1801 the respondent was married to Sir James Gordon of Letterfourie, Bart., on which occasion a contract of marriage, to which Mr. Glendonwyn was a party, was executed, by which he agreed to pay a tocher of 2,000*l.* to Sir James; and among other clauses there was the following:—"And farther, it is
" hereby contracted and agreed upon by both parties,
" that the said 2,000*l.* of tocher now paid by the said
" William Glendonwyn with his said daughter shall be
" in full of all the said Mary Glendonwyn can claim in
" right of her said father, or of the deceased Agnes
" Gordon her mother, in any manner of way, and in
" full of every claim competent to her of all bairns
" part of gear, legitim, portion natural, executry, and
" every thing else that she could ask or claim by and
" through the decease of her said father or mother,
" excepting what the said William Glendonwyn may
" think fit farther to grant or bestow of his own good
" will allenarly."

About the year 1808 the youngest daughter Ismen

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intermarried with William Scott, Esq. Mr. Scott purchased from Mr. Glendonwyn the estate of Crogo for 12,000*l.*, and in the year 1809 he also bought from him the estate of Parton for 60,500*l.* Mr. Glendonwyn died in the course of the same year.

Some time thereafter Mr. Scott became insolvent, and was unable to pay the price of the lands which he had purchased. A process of ranking and sale of his estates was thereupon raised at the instance of his creditors; and, under the authority of the Court of Session, the estate of Parton was sold for a sum which did not amount to the price and arrears of interest due thereon.

Miss Glendonwyn put in a claim to be ranked on the price of the estate for the provisions due to her under her mother's bond of provision; and for which she was accordingly ranked and received payment of the money. Mrs. Scott, with consent of her husband, assigned her provision in trust to the late Mr. David Ramsay, W.S., who in that character lodged a claim, which was opposed by the common agent, on the ground that the bond being merely a personal bond, fell under the *jus mariti* of Mr. Scott, and was compensated by the large balance of the price which was due by Mr. Scott. Mr. Ramsay contended, on the other hand, that the bond was heritable, and therefore did not fall under the *jus mariti*; and the Court having sustained this plea¹, Mr. Ramsay received payment of the principal sum and interest.

In the meantime no claim was made on behalf of Lady Gordon for her provision, it having been supposed

¹ 23d June 1825, 4 S. & D., p. 108, (new ed. p. 110.)

that it was embraced in the discharge contained in the marriage contract. But in 1832 she lodged a claim for the amount, to which objections were stated, both by the common agent, and by Miss Glendonwyn and Mr. Napier the assignee of Mrs. Scott, both these ladies being creditors for the respective shares of the residue of the price. The main objections were that the claim was discharged; that if not discharged, the provision fell under the *jus mariti* of Sir James, and that he being indebted, by certain bills, to the late Mr. Glendonwyn, his executors were entitled to set off the amount of the provision, and at all events the interest, against these bills. The Lord Ordinary, on the 5th Feb. 1835, pronounced this interlocutor:—

“ The Lord Ordinary having heard the counsel for the parties on the objections to the claim for Lady Gordon, finds her Ladyship entitled to be ranked in her own right to the principal sum contained in her mother’s bond of provision, and to the interest thereon in right of her husband Sir James Gordon, and ranks and prefers her accordingly, and decerns; but finds that the ranking, in so far as regards the interest, is subject to any claim of compensation founded on the bills referred to in the objections, at the instance of the executors of the late William Glendonwyn against the said Sir James Gordon, in so far as they can instruct the same; quoad ultra repels the said objections.”

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The appellants presented a reclaiming note against this interlocutor, but the Court on 9th June 1835 adhered.¹

¹ 13 S., D., B., & M. p. 883, (new ed.)

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They then entered their appeal.

Appellants.—According to the sound construction of the discharge in the marriage contract, all claim which the respondent had, in virtue of the bond of provision, whether as against her mother, or her father, was fully discharged.

The discharge consists of three distinct substantive parts. The 2,000*l.* which Mr. Glendonwyn gave as the consideration for it, is declared, 1st, to be in full of all that the respondent could claim in right of her father or her mother, in any manner of way; 2dly, to be in full of every claim competent to her, of all bairns part of gear, legitim, portion natural, and executry: and 3dly, of every thing else that she could ask or claim by and through the decease of her father or mother, except what Mr. Glendonwyn might think fit farther to grant or bestow of his own free will.

It seems to be a singularly strict and limited construction, to hold that this discharge does not reach the bond of provision in question. That bond is a claim against her father, payable within twelve months after the death of the longest liver of her mother and father; and which sum became exigible twelve months after his death, he being the longest liver. It is clearly a sum or debt which the respondent can claim, in right of "the said deceased Agnes Gordon her mother," in some manner of way. Unless the bond was to be specifically mentioned, hardly any words can be imagined which would more distinctly comprehend it,—and it cannot be contended, that the special mention of

it was necessary to its effectual discharge. But it is said, that as the clause relates specifically to "bairns part of gear, legitim, portion natural, and executry," it cannot be extended to any claims other than those of the nature of legitim or of succession; and that as the bond is not only a debt, but is one of an heritable nature, the discharge cannot be construed so as to comprehend it; and this is based on the rule, that where a party gives a specification of particulars, preceded or followed by general words, the general words are not meant to extend to things of a different kind,—that the enumeration points out the kind of things contemplated,—and that had others of a different nature been thought of, they would have been mentioned. This, no doubt, is the general rule, but that rule is founded on the implied intention of the parties; and therefore it ought not to be applied where, from the structure of the clause, it is evident that the general words were not meant to be restrained by the particular specification.

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The intention of the parties is to be gathered from the terms and structure of the whole clause, each part of which is individualized, both by the form of the clause, and the particular mode of expression, so that each ought to be taken per se, instead of the one being interpreted by the other.

The respondent, it is provided, shall receive the 2,000*l.* paid to her in full of all she can claim "in right of her father, or of the deceased Agnes Gordon her mother, in any manner of way, and in full of every claim competent to her of all bairns part of gear," &c. These two portions of the clause are quite dis-

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tinct, and the frame of the clause marks, that instead of the latter being introduced with an intention to limit the first, it was introduced in order to add to it,—to contain a special provision of its own, but to leave the former its full effect, the same as if it had stood alone. Then there is added to the enumerating part of the clause, the farther declaration, that the 2,000*l.* is accepted also in full of “every thing else that she (the “respondent) could ask or claim, by or through the “decease of her said father or mother,” excepting what the former might choose to bestow upon her of his own free grace. It is not disputed, that if the bond be merely a personal debt, these words are sufficiently broad to comprehend it; but it is said to be an heritable debt, and therefore to be a claim of a different kind from those mentioned in the preceding part of the clause.

It is true that the Court below, adopting the argument of the respondent, held the debt to be heritable, and that the claims specially mentioned in the discharge clause of the contract of marriage, being all of a moveable nature, the other parts of the clause, however comprehensively expressed, could not be extended to include an heritable debt.

The Court appears to have been misled as to the nature of the claim, by the case of Ramsay, and by not attending sufficiently to the terms of the power under which Mr. Glendonwyn executed the bonds of provision.

The case of Ramsay originated in a claim made in the ranking by the assignee of Mrs. Scott; and the plea of the common agent was, that being a moveable

bond it fell under Mr. Scott's *jus mariti*; that it therefore belonged to Mr. Scott, and that he being debtor to Mr. Glendonwyn in the price for which he Mr. Scott had purchased the estate of Parton, the amount must be set off against the debt due by him. But the answer was, that whatever might be the general nature of the bond, it was heritable, as in a question between husband and wife,—that it therefore did not fall under the *jus mariti* of the husband; that he was not creditor in it, and that Mrs. Scott having nothing to do with the debt due by Mr. Scott to Mr. Glendonwyn, she could not be affected by any plea bottomed on that ground, and as little could her assignee. Accordingly, the Court decided that the bond was heritable as between Mr. and Mrs. Scott. But, granting the decision to be right, it affords no ground for treating the bond to the respondent as heritable in the present question, which is one between the creditor and debtor, as to whether it was discharged or not. As between these parties, the bond is indisputably moveable; and it ought to have been taken as possessing that character, in resolving the question, whether it was comprehended by a discharge granted by the creditor, and taken by the debtor.

Another circumstance which apparently weighed with the Court, in inducing them to hold the bond as not discharged, was the terms of the power under which it was executed. It seemed to be assumed, that that power gave the bond an heritable character. But this is a mistake:—Mrs. Glendonwyn disposed her estate of Crogo to her husband, under this provision, that, by acceptance thereof, “he shall become liable in payment

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“ cease, and of the provisions settled or to be settled
“ by me upon my children ;” and it was in exercise of
this reserved right, that she executed the bonds in
favour of her daughters. But the provisions were not
made real burdens on the estate, or rather the estate
was not conveyed under the real burden of such pro-
visions as she might grant. On the contrary, not only
is the amount to which they might extend not declared
in the disposition, which, of itself, would have been
fatal to their being real burdens, but, by the conception
of the clause, the payment of them is made merely a
personal obligation against Mr. Glendonwyn, and not
a debt burdening the lands themselves.

The claim, therefore, not being heritable, but
being moveable, was discharged by the marriage con-
tract ; and it was so, even upon the assumption that the
specification in the second part of the clause were to be
held as confining or limiting the general words of the
clause to debts or claims ejusdem generis.

The discharge was granted of all that the respon-
dent could claim in right of her father or mother, in
any manner of way, and of every thing she could ask
or claim by or through their decease, and of all bairns’
part of gear or legitim and executry.

If the discharge had mentioned only executry, or only
bairns’ part of gear or legitim, it might have been
contended that the general words could not be ex-
tended to claims of debt ; but where the discharge is
of all claim competent to the respondent as in right
of her mother, against her father, in any manner of
way, and of every thing else she could ask or claim

by or through the decease of her father or mother, it is extravagant to maintain that this does not comprehend a bond of the nature of that in question.

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Besides, the rule of law is, that *debitor non presumitur donare*¹; and therefore the legal presumption is, that the 2,000*l.* was paid by Mr. Glendonwyn in extinction of the 1,350*l.* due by him under the bond; and it cannot reasonably be supposed that he intended to give the respondent 2,000*l.*, and at the same time remain indebted to her in 1,350*l.* This presumption is fortified by the conduct of the respondent, which shows that she understood that the bond was discharged; for although the legal proceedings were instituted in 1817, she made no claim in respect of it till 1832.

Respondent.—The clause in the marriage contract discharges merely the respondent's interest as a lawful child in the succession of her father and mother. The contract stipulates, that in respect of a tocher of 2,000*l.* then paid, the respondent was to have no claim, 1st, as an heir in *mobilibus* of her mother, to call the father to account for his wife's share of the goods in communion;) nor, 2dly, as an heir in *mobilibus* of her father, (her interest in his "*executry*" being discharged;) nor, 3dly, to that share of her father's moveables, which he could not have disappointed by any testamentary deed. This third legal right is anxiously discharged under the words by which it is usually described, "*bairns*" part "*of gear, legitim, portion*"

¹ *Borthwick* against *Livingston*, March 1684; *Stenhouse* against *Young*, 15th June 1737.

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“ natural.” All these the respondent might have lawfully claimed on the decease of her father (who died intestate), had they not been discharged by her marriage contract.

But the marriage contract discharges nothing else than the respondent's rights to the moveable estate of her parents. It does not cut off or discharge the respondent's rights as one of the heirs at law of her father in his heritable or land estate, nor does it discharge any ordinary debt due to her by him. It does not discharge his liability to account as a trustee for any sum intrusted to him and his heirs on behalf of the respondent, at whatever date the sum may have been declared payable.

A land estate, Crogo, was conveyed to Mr. Glendonwyn, and accepted by him under the condition that he should become debtor to the respondent for the sum of 1,350*l.*, payable at the death of the longest liver of him and his wife. The obligation which he undertook was onerous; and, by the decease of his wife, became irrevocable. In the marriage contract not one word is said which implies that it was in the view of the parties to discharge the debt on Crogo, due to the respondent; if such intention had existed, it was too important not to have been specially mentioned, and the intended husband of the respondent ought to have been told that the amount of the sum paid to him nominally as a tocher with his bride by her father was a delusion, inasmuch as, to the extent of 1,350*l.*, the father was merely paying an onerous debt, instead of acting with liberality towards his daughter.

The whole terms of the clause demonstrate that the

discharge bore reference to the ordinary rights and claims competent to the respondent, and to every lawful daughter, in relation to the ordinary course of legal succession, and not to any special provision or *jus crediti* absolutely secured in her behalf. The terms of the clause are applicable to the ordinary rules of the law of succession, and to nothing else, and in no other light could the respondent's intended husband or his legal advisers understand the clause. By the law of Scotland, general terms of discharge subjoined to an enumeration of special claims are not held applicable to rights or claims of a different description.¹

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In the present case not only are the rights specially enumerated in the marriage contract (being rights of succession) of a different kind from the onerous debt, of which payment is now demanded from the heirs portioners of Mr. Glendonwyn; but, by inserting special clauses in the disposition of the estate of Crogo, care was taken to render the provisions in favour of the disponent's daughters heritable burdens on the lands; whereas the rights of succession to moveables which are specified in the marriage contract are necessarily personal. In the procuratory of resignation and precept of sasine, special reference is made to the burden or debt in question; and, accordingly, in the case of Ramsay, it was held that the bond granted to the respondent's sister must be dealt with as an heritable debt. But whether it be so considered, it is clear that the bond constitutes a debt, and as such it

¹ Erskine, b. iii. tit. 4. sec. 9.

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cannot be comprehended within the terms of the discharge.¹

LORD CHANCELLOR.—My Lords, in the cause which was heard at your Lordships bar yesterday the question was, whether a release or discharge contained in a marriage settlement of the respondent had discharged a claim to the sum of 1,350*l.*, to which she was entitled under a bond executed by her mother, and by a contract between the father and mother made payable by the father?

My Lords, it appears at the time the marriage settlement was executed, which was supposed to contain the discharge of this claim, the daughter was entitled to this bond. She was also entitled to a proportionate share of the property of the mother in the hands of the father, and in the event of the father dying leaving property applicable to this purpose, she would be entitled to a share of the father's estate.

It appears that upon the marriage of that daughter a settlement was made containing the clause upon which the question arises. The bond itself was executed by the mother, and contains this provision, that the 1,250*l.* (the 100*l.* being added by a subsequent instrument) should be "in full satisfaction" to the daughters "of all bairns part of gear, portion natural, executry, or any other thing which any of them can claim through their mother." These words are not

¹ A good deal of discussion of a special nature arose as to the right of the appellants to a diligence to recover correspondence to prove the meaning of the clause; but this was precluded by a final interlocutor, and is otherwise unnecessary to be reported.

unimportant when I come to consider part of the terms upon which the contest has arisen at the bar. The marriage contract also provided that the provision then made should be a discharge as affected the husband's estate, and a discharge (which raises the question as to this claim) against the father's estate, and it appears to me that the terms used in both these parts of the deed are not unimportant to be attended to.

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Now, my Lords, with regard to the husband's estate there is this clause:—"And which provisions before
" written, conceived in favour of the said Mary Glen-
" donwyn, she hereby, with consent of her said father,
" accepts of in full satisfaction of all terce of lands,
" half or third of moveables, and every other claim or
" provision whatever which she could by law ask or
" demand by and through the decease of the said
" James Gordon in case she shall survive him, and in
" full of all that her heirs and executors or nearest of
" kin could ask or claim on any account whatever by
" and through her decease in case she shall predecease
" her said husband." Then comes the provision out of
which the question arises:—"and which provisions be-
" fore written, conceived in favour of younger children
" or daughters of this marriage, are and shall be in full
" satisfaction to them of all bairns part of gear, legitim,
" portion natural, executry, and every thing else that
" they could ask or claim by or through the decease of
" the said James Gordon, excepting what he might
" think proper to bestow of his own good will."

Then come the words upon which the question arises:—"and further it is hereby contracted and agreed
" upon by both parties, that the said sum of 2,000*l.* of

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“ tocher now paid by the said William Glendonwyn
 “ with his said daughter shall be in full of all the said
 “ Mary Glendonwyn can claim in right of her said
 “ father or of the deceased Agnes Gordon her mother,
 “ in any manner of way, and in full of every claim com-
 “ petent to her of all bairns part of gear, legitim,
 “ portion natural, executry, and every thing else that
 “ she can ask or claim by and through the decease of
 “ her said father or mother, excepting what the said
 “ William Glendonwyn may think proper to grant or
 “ bestow of his own good will.”

Now, my Lords, it was contended that the latter words in that sentence and the words in the early part of that sentence both have the same meaning.

My Lords, I have referred to the provisions of the bond itself affecting the mother's estate, and to the provisions in the marriage settlement affecting the intended husband's estate, and compared them with those which are introduced affecting the father's estate ; and your Lordships will find the same expressions are used in all those provisions. Now it is quite clear that in the other provisions those general words by which they might claim “by or through the decease” were not intended to apply to any thing except what the parties might become entitled to by succession according to the laws of Scotland. It is clear, therefore, that these words applied only to right or claim which would devolve upon the respondent upon or in consequence of the death of the father and mother. These parties therefore described legitim as a claim “by or through the decease” of the parent, which is not very correct, inasmuch as the death of the

parent does not create the right, but only brings it into action.

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On the part of the appellant it was contended that the first and last part of the release meant the same thing; if so, as the latter is clearly confined to such claim as legitim, executry, &c., the meaning of the words first used must be equally so confined. It is true that the first words constitute a distinct sentence of themselves, and that if they mean only such claim as legitim and executry they are inoperative, and that there is needless repetition. But the appellant, by contending that the first and last words are operative to the same purpose, that is, that they both apply to the bond debt, admits that the sentence is twice repeated, and that one of the sets of words is inoperative.

It is true that the words "in right of the father or "mother" do not very correctly apply to the claim of legitim or executry, but perhaps they do not less accurately describe those claims than the words "by or "through the decease" of the parents, by which words the parties have themselves described those claims; and as applicable to the claim against the father's estate to which the child was entitled as a child of the mother, the expression is not perhaps incorrectly used. The child was entitled to a share of the mother's estate in the hands of the father; to that amount the child claimed against the father as a child of the mother, and in that sense, in right of the mother at least, those words are much more applicable to such a claim than to the claim under the mother's bond. In that claim the child was the obligee, the mother the obligor, and

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the father, having taken upon himself the duty of paying the bond, was in the character of a debtor only. In what sense can the claim of the obligee be said to be in right of the obligor or of the debtor liable to pay the bond? It was said that the mother reserved to herself the right of giving a portion to her daughter, and that by the bond she transferred that right to her daughter, but it is clear that such right of the mother was exercised and exhausted by her giving the bond, and that in lieu of her right so exercised a debt arose due to the daughter. That which the daughter obtained cannot be identified with the right which the mother reserved, and it was well observed, that as the father and mother are included in the same sentence, the same meaning must be applied to a claim in right of each. But in what possible sense can this be said to be a claim in right of the father who is connected with it only in the liability to pay?

Many authorities in the law of Scotland were referred to for the purpose of proving that general words were to be construed by reference to the subject matter particularly described, and were not to extend to other matters not ejusdem generis, which is a rule founded upon common sense and the ordinary usages of mankind. If the parties had not such foreign matter in contemplation, the ~~heating~~ it, as included in the general expression used, would be contrary to their intentions; and if they had it in contemplation, it cannot be supposed that they would have omitted to specify it: at all events, the general words must be such as in their natural and ordinary meaning to embrace the matter in question.

The appellant must assume, that not only the father, but the daughter and her intended husband, had this bond in contemplation when they executed this settlement, and that the first words in the discharge were introduced expressly to include it. This appears to me to be a very incredible supposition. It is obvious that if the father intended to protect himself against the bond, and did not intend to effect the object by fraud, he would have referred to it in terms. The claim under the bond is of a totally different nature from any of those specified, and the general words appear to me to be totally inapplicable to such a claim. I do not overlook the observation which was made at the bar as to the claim against the father's estate, with respect to what he owed to the child as legitim, which, to a certain extent, may be considered in the character of a debt.

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I am therefore of opinion, that the judgment of the Court of Session is correct, and that the interlocutor complained of ought to be affirmed.

Being of this opinion upon the terms of the settlement, it is not necessary to decide whether the bond is to be considered as an heritable bond: and considering that this is a claim of a creditor against the property of the debtor, and that there was no difference of opinion amongst the judges below, I think that the appeal ought to be dismissed with costs.

LORD BROUGHAM.—My Lords, I entirely agree in the opinion to which my noble and learned friend has arrived in this case, to which I paid as much attention as I could yesterday, though I was prevented by an

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engagement elsewhere from hearing the argument on the part of the respondent. But my opinion having been against the appellant upon his own showing, I did not think it so necessary to attend to that argument. I have carefully considered the case, and I have found nothing to shake the opinion which I formed upon reading the words in question.

My Lords, I have here again to express my regret, in which I have no doubt those noble Lords who have attended to those cases will concur, that we have no note of what passed in the Court below; we are left wholly in the dark, not only as to the *rationes decidendi*, if any were assigned,—(and permit me to observe in passing, that it is less likely that reason will be given for judgments in the Court below if it is well known that no transcript of these reasons ever reached your Lordships, when cases come by appeal. It is obvious that the old practice, the sounder, the more wholesome, and the more convenient practice, of furnishing the Court of appeal with notes of what passed on advising the cause below, that is, deciding the cause below, had a tendency to call the attention of the learned judges to the grounds, and to induce them to state the grounds upon which they gave their judgment when the case came before them;—my Lords, we not only have no account of the reasons given, and upon which the judgment under appeal was rested, but it so happens, in this case more than even in the last, that we do not know what the question was that came before the Court for its decision. No person can here tell whether the question was either argued at the bar or disposed of by the bench upon the words

of the settlement in the two clauses, the first and the third clause, of the settlement, the passage of the settlement now in question, or upon the other wholly different question, Was or was not the bond heritable — not heritable to the defect of the devolution of the succession, but heritable to the effect of its nature in law, and its incidents upon the funds of the obligor of the settlement? If it was heritable *cadit questio*. My Lords, I must say, that if I were called upon to give an opinion upon it,—though I quite agree with my noble and learned friend that it is unnecessary at present to decide that,—but if I were called upon as at present advised to say whether the nature of this settlement was such that it was a charge upon the land, (I do not mean to say as to devolution,) but whether it was a charge upon the land in respect of its being heritable or no, I am disposed to agree with the Court below, which upon this very bond, or at least a bond conceived in terms of this bond, gave a decision that it was heritable. I mean heritable *suâ naturâ*; because it is quite immaterial to the question whether as to the devolution of the succession it was so or not; but whether *suâ naturâ* the bond was an inheritable instrument. Now we do not know whether that was or not the only point raised before the Court, and the only matter disposed of by the Court.

Again, it has been said by the Attorney General, in that part of his argument to your Lordships which I heard, that the real question before the Court was, shall or not diligence go against the party,—the process to compel the production of the instrument, in the nature of a *subpœna duces tecum*? I must say that we

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sit here in a foreign country, as it were in regard to law,—to decide questions upon a law not familiar to the judges who are called upon to dispose of those questions. We are called upon often to lay down a law which shall regulate the decisions of a Court sitting in the other country ; which shall regulate the conveyancing and the practice of conveyancers in that country, and shall dispose of the most important rights of the subjects there. We are called upon under those circumstances, and labouring under all those disadvantages, and without the aid which we have in cases arising in this country, in which we are to dispose of questions arising under our own law, namely, the *copia prætorii* which the attendance of the judges always gives to your Lordships when you call for it. When without that aid, or any thing like that assistance, we are called upon to dispose of such questions, labouring under such great difficulties, it surely is not too much to ask that those necessary difficulties should not be needlessly increased, by keeping us in the dark as to what took place in the Court below,—not only the grounds of the Court's decision, but the very questions raised by the parties before the Court, to be by the Court disposed of. I do hope, therefore, that this second occasion will be one of the last upon which we shall have to complain of it, though undoubtedly during the next five or six cases before your Lordships it may not be very easy to supply the defect of which we now so justly complain.

Now, having said so much upon this case, I have to add, that I entirely take the same view as my noble and learned friend does of the question for your

Lordships decision. In the first place, I think that I should have had no great doubt upon it, if the first of the three limbs of the passage in the settlement stood alone, because what question would then arise? It would raise this question: can the obligee, the party entitled beneficially under the bond of reversion, be said to claim in right either of the father or of the mother, the mother being the obligor in the bond, and the father being the party taking upon himself the burden as obligor in that bond by a kind of transfer from the principal and original obligor? To that question I should have little hesitation in giving a negative answer if it stood alone; but it does not, and the reason why I say I should have little hesitation in giving a negative answer is, that I cannot comprehend how, either in strictness of technical language or in common parlance, a party can be said to claim in right of the obligor of an instrument when that party's claim is wholly constituted by the obligation contracted in that instrument. Suppose I am obligee in a bond granted by A., do I claim in right of A.? No; I claim against it. A claiming in right of A. assumes that I claim by privity with A., that I claim under A. But I claim adversely to A.; I am the obligee, the creditor; A. is the obligor, the debtor. With no accuracy—in no intelligible sense can it be said that the party so claiming quasi creditor is claiming in right of his debtor.

Then it may be said, and at first I was inclined to listen to that contention, that A. having transferred, that is to say, the wife having transferred, so that the husband became the obligor by the transfer, then the obligee, the party under the bond of provision, may be said to claim in right of the original obligor. But still

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I think that would be inaccurate; not perhaps so inaccurate as the other, but still it would be very inaccurate, and not either a technical or a sensible construction in common parlance; because, suppose I have an obligation constituted in my favour by A., and claiming against A. adversely as the creditor, and B. the debtor, A. by some other transaction transfers to B., and B. comes in the shoes of A., the obligor and my debtor, it is clear that I do not claim in the right of B., the transferee or assignee of the obligation which A. had contracted with me. But do I any more claim in right of A., the original obligor, my original debtor, the assignor of the obligation to B.? Assuredly not; A. was my original debtor, I do not claim in right of him; B., as my debtor by assignment, I do not claim in right of him; but I claim against B. because B. has placed himself by the contract in the shoes of A. I therefore hold that it is inaccurate to say, either in regard to the original obligation contracted to me or the transfer of that obligation by assignment, that I claim in right either of the assignor of the obligation, that is to say, the person who has transferred to another, or the person to whom that obligation has been transferred.

With respect to the second part of the sentence, the specification part of the clause, it is quite clear; though there is, no doubt, a repetition three times over of legitim by a tautology not unusual in all conveyances in all countries. The legitim is described as legitim—bairns part of gear, which is the usual Scotch-law mode of describing it, and the executory, that is to say, the personalty, which falls under the distribution after the decease, is also specified; it is quite clear that those words do not aid the argument of the appellant or

impeach the judgment of the Court below ; but they do more, they aid the argument of the respondent, and tend to set up and confirm the judgment of the Court ; because it is an undeniable principle in all construction that where there is an elaborate specification, and particularly an anxious specification, as the Scotch lawyers call it, that then you are to take the construction of generality by the particularity, and limit it accordingly, so as to make it apply to things ejusdem generis. That applies to where there is a doubt ; here I do not think there is a doubt, even if there had been no specification.

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So far upon the second branch of the disputed clause. The only other remark that arises is, that nothing can be drawn from it in favour of the appellant's argument, but that whatever inference is to arise from it is in favour of the respondents. Then we come, in the last place, to what appears to me, if there had been any doubt upon the preceding part, to leave none whatever, because it says, any thing she can ask or claim " by or " through the decease " of the parent. Can anybody doubt that that which a party claims " by or through " the decease " can in no sense whatever be said to be a description of what he claims, without the least regard to by or through the decease of anybody, except that it marks the term of payment or of performance, namely, the obligation and the right constituted by the bond of provision ? It is quite clear that it cannot ; I agree that it is inaccurate in any sense to say that any claim even not under the bond of provision,—even of legitim, can arise by or through the decease, because it arises by or through the relation of parent and child. It becomes what the Scotch lawyers call after the civil

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law, ~~executable~~, and payable at the decease. Instead therefore of saying "by or through the decease," the accurate expression would have been "upon or after the decease;" but it is more incorrect to say that the obligation under the bond of provision arises "by or through the decease" of the parent when it arises by or through the bond, than it is to say that the right of legitim arises by or through the decease. Neither of them is an accurate expression, but I think the former is more inaccurate, and a wider departure from technical language than the latter.

My Lords, I stated that I thought if the first part claiming "in right of" had stood alone, without either the specification in the second or the words "by or through the decease" in the last, there would have been no doubt. I am clearly of opinion that the latter part removes all doubt, and therefore that the judgment of the Court below, proceeding upon that view as I take for granted it did, if that point were ever raised, is right. I am told it was not, and if so it is still more hard upon us to have that point raised here for the first time which was not raised in the Court below. But whether it was so or not, under the circumstances of this case, and with the unanimous decision in the Court below, —with respect to which there was so little doubt raised in my mind that I was not, for my own part, for hearing the respondent,—the case being so clear, and the further consideration of it not having tended in the slightest degree to cloud it with any kind of obscurity, or to raise any hesitation in our minds, I think, with my noble and learned friend that this appeal ought to be dismissed with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House ; and that the said interlocutors therein complained of, be and the same are hereby affirmed : And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal ; the amount thereof to be certified by the clerk assistant.

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ARCHIBALD GRAHAME—GEORGE WEBSTER, Solicitors.

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SIR EVAN JOHN MURRAY MACGREGOR, Bart., and JOHN
ATHOLL BANNATYNE MURRAY MACGREGOR his eldest
Son, Appellants. — *Attorney General (Campbell)* —
Burge.

JAMES BROWN, Respondent. — *Sir William Follett* —
Dr. Lushington.

Entail. — An entailer disposed his lands to himself in life-rent, and to his son in fee, whom failing, to a series of substitute heirs of entail, and the irritant and resolute clauses provided, that if “the heirs descending of my body, or any of the other heirs of tailzie before mentioned shall contravene,” &c., “the person or persons so contravening shall forfeit,” &c. : Held (affirming the judgment of the Court of Session) that these words did not apply to the institute, although he was “an heir descending of the body” of the entailer; and the structure of the deed showed that the entailer considered the institute to be included under the term “heirs of entail.”

1st Division. **B**y disposition and deed of entail dated the 15th of March
Ld. Corehouse. 1814, and by supplementary deed of entail dated the
21st May 1814, the late Sir John Murray Macgregor disposed to himself in life-rent, and to the appellant Evan John Macgregor Murray his son, and the heirs male of his body in fee, the lands of Laurick and other

lands, whom failing, to John Atholl Bannatyne Macgregor Murray his grandson, and a certain series of substitute heirs, including not only descendants of his own body, but also collateral relations. The deed contained, inter alia, the following clauses :—“ Second, That it shall
 “ not be in the power of any of the heirs of entail,
 “ hereby substituted to me to alter, innovate, or
 “ change this present deed of tailzie, or other writ or
 “ deed to be made by me, or order of succession hereby
 “ prescribed, or which may therein be appointed, or to
 “ do any act or deed that may import or infer any
 “ alteration, innovation, or change thereof, directly
 “ or indirectly; but with this exception always, that
 “ in case any presumptive or apparent heir or heirs
 “ who might succeed to the said lands and estates shall
 “ be forfeited or attainted of treason, or misprision of
 “ treason, or be under any other legal incapacity which
 “ may exclude or disable him, her, or them from
 “ taking, holding, and enjoying the said lands and
 “ estates, then and in that case it shall be in the power
 “ of any of the heirs of entail who have succeeded to
 “ the said lands and estates, and shall be in the fee
 “ thereof at the time, so often as such case shall happen
 “ in all time coming, by a deed under his or her hand,
 “ to renew this my entail in favour of him or herself,
 “ and the other heirs called after them to the succession, according to the order before written, and
 “ nomination to be granted by me, who shall be capable
 “ to succeed, leaving out or passing by such apparent
 “ or presumptive heir so rendered incapable by taking
 “ and holding said lands and estates, in the same
 “ manner as if such heirs were naturally dead, and to

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MACGREGOR “ settle the said estates and succession upon himself,
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BROWN. “ herself, and the other substitutes who are under no
 12th Feb. 1838. “ legal incapacity; but with and under the whole
 “ burdens, conditions, restrictions, obligations, pro-
 “ visions, declarations, exceptions, exclusions, and
 “ clauses prohibitory, irritant, and resolute, herein
 “ contained.”

“ Third, That it shall not be in the power of
 “ the said Evan John Murray Macgregor, or John
 “ Atholl Bannatyne Macgregor, or any of the other
 “ heirs of tailzie substituted to me in manner fore-
 “ said, who shall succeed to my said lands and estates,
 “ to sell, alienate, wadset, impignorate, or dispo-
 “ the said lands and estates, or any part thereof,
 “ either irredeemably or under reversion, onerously or
 “ gratuitously, or to gift or dispose of the same, or to
 “ grant securities affecting the same, or to burden the
 “ said lands and estate, in whole or in part, with debts
 “ or sums of money, infestments of annual rents, or
 “ any other burden or servitude whatever, nor to con-
 “ tract debts nor grant deeds, nor to incur the guilt of
 “ treason or misprision of treason, nor, in short, to do
 “ any act or deed, directly or indirectly, whether of
 “ a public or private nature, whereby the said lands
 “ or estates may be burdened, affected, forfeited,
 “ escheated, or evicted from them in any manner of
 “ way whatever, or this present tailzie, or course of
 “ succession hereby described, in any shape prejudiced,
 “ altered, or infringed.”

The irritant and resolute clauses of the entail were
 in the following terms: “And these presents are
 “ granted by me with and under the irritances follow-

“ ing; viz., that in case the heirs descending of my
 “ body, or any of the other heirs tailzie before men-
 “ tioned, shall contravene any one of the particulars
 “ above specified, that is, shall fail or neglect to obey
 “ and perform the said conditions, provisions, and
 “ obligations, or any of them, or shall burden the
 “ estate, or any otherwise act contrary to or in con-
 “ travention of the said restrictions, limitations, and
 “ prohibitions, or any one of them, that then and in
 “ any one of these cases not only all such acts, facts,
 “ deeds, and debts contracted, done, or committed
 “ contrary thereto, or to the true intent and meaning
 “ thereof, with all that has followed or that may
 “ follow thereon, shall be in themselves void and null
 “ and of no avail, force, strength, or effect, at least
 “ unavailable or ineffectual against the other heirs of
 “ tailzie; and neither the lands and estates, and others
 “ foresaid, nor any part thereof, shall be anyways
 “ burdened or affected therewith, but shall be as free
 “ and disengaged from the effects of all debts, deeds,
 “ omissions, or commissions as if the same had never
 “ been granted, contracted, done, or taken place; but
 “ also the person or persons so contravening, by failing
 “ to obey the said conditions, and implement said
 “ obligations, or by acting contrary to the said limita-
 “ tions and prohibitions, shall, ipso facto, amit, lose,
 “ and forfeit all right, title, and interest, which he or
 “ she hath to the said tailzied lands and estates, and
 “ the same shall become void and extinct, and the
 “ said tailzied lands shall devolve, accresce, and belong
 “ to the next heir of tailzie appointed to succeed, al-
 “ though descended of the contravener’s own body,

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MACGREGOR “ in the same manner as if the contraveners were
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 BROWN. “ naturally dead.”

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The deed also contained clauses enabling “each of
 “ the said whole heirs of entail above mentioned ” to
 make provisions for spouses and younger children ; also
 power to the several heirs of tailzie who shall succeed “ to
 “ make excambions on certain terms ; ” and it was also
 specially provided and declared, “ that the said Evan
 “ John Macgregor Murray, or John Atholl Bannatyne
 “ Macgregor Murray, and the other heirs of tailzie
 “ and provision, shall have power and are hereby autho-
 “ rized to excamb the lands of Gart, either in whole or
 “ in part, upon receiving an equivalent therefor in
 “ lands more contiguous to my said estates, and the
 “ difference in value, if any, in money ; and in the
 “ event of such excambion not taking place my said
 “ heirs of tailzie shall be entitled and are hereby
 “ authorized to sell the said lands of Gart,” &c.
 Power was reserved to the entailer “ not only to
 “ alter the said course of succession as to all the heirs
 “ of tailzie before specified,” but to sell and burthen.

There was also a provision, that if the entailer died
 without making up titles to all the lands in the entail it
 should be obligatory on “ my heirs at law, and other
 “ heirs,” to make up titles and denude themselves “ in
 favour of “ the said heirs of tailzie.” And an obliga-
 tion was imposed on “ the said Evan John Macgregor
 “ Murray my son, and failing him, the said John Atholl
 “ Bannatyne Macgregor Murray, and all the heirs of
 “ tailzie,” to record the entail. The precept of sasine
 directed infeftment “ to be given and delivered to me
 “ the said Evan John Macgregor Murray for myself in

“ life-rent, and to the said Evan John Bannatyne Mac-
 “ gregor Murray in fee, and to the other heirs of tailzie
 “ above mentioned, in the order before prescribed.”

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Upon the death of Sir John Macgregor Murray, his son the appellant made up his titles, in 1823, as institute by charter following upon the procuratory in the original deed and supplementary deed of entail, and by sasine upon the charter.

On the 1st of October 1830 the appellant and two other persons bound themselves by their promissory note, conjunctly and severally, to pay to Mr. Michael Linning the sum of 5,000*l.* at the term of Lammas 1831. This note, having been indorsed by Mr. Linning to Sir William Forbes and Company, was protested at their instance for non-payment; and some time afterwards it was assigned with the registered instrument of protest in favour of the respondent Mr. James Brown, accountant in Edinburgh.

In order to effect payment of the debt Mr. Brown, on the 2d of October 1834, raised an action against the appellant, concluding for adjudication of such parts of the lands included in the entail as should be sufficient to pay the debt with interest. In defence the appellant pleaded that he held the lands under a strict entail, and that the adjudication must be subject to the provisions and fetters of that entail, so as not to occasion any contravention of it in the appellant's person. Appearance was also made for John Atholl Bannatyne Murray Macgregor, Esq., eldest son of the appellant, and the party substituted next in order to him in the entail, and he adhered to the defence set up by his father.

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The Lord Ordinary, on the 12th November 1835, repelled the defences, decerned in terms of the libel, and found the respondent entitled to expenses; and issued this Note:—" It appears to the Lord Ordinary perfectly clear that there is no prohibition in this entail against altering the order of succession, effectually imposed on Sir Evan John Murray Macgregor, the institute. There is a very careful and anxious clause against alteration and innovation, and all acts and deeds directly or indirectly importing them, but that clause is expressly limited to the heirs of entail substituted to the maker, and, therefore, as is admitted, it cannot bind the institute.

" A second prohibition is directed against alienating, burdening, contracting debt, and committing treason or misprision of treason, and of the acts and deeds of that nature a special and detailed enumeration is given. Then follows a general clause, professing to be a summary or abridgement of that special enumeration: 'nor, in short, to do any act or deed by which the lands may be burdened, affected, &c., or this present tailzie or course of succession prejudiced, altered, or infringed.' Now, there is no rule of law better established than that laid down by Mr. Erskine, namely, that in all deeds and instruments whatever a general clause following a particular enumeration is not to be extended further than the particulars enumerated. Therefore, it is certain, that the general clause at the end of the second prohibition must be restricted to deeds of alienation, debts, and crimes, and cannot include the acts which form the subject of the first prohibi-

“ tion. The second prohibition, therefore, though
 “ directed against the institute, as well as the heirs,
 “ cannot supply the defect which exists in the first.
 “ It is this rule of law that distinguishes the present
 “ case from that of Roxburghe and others, in which
 “ clauses expressed in general terms, but not preceded
 “ by special enumerations, were found to have a more
 “ extensive operation, and to render effectual the
 “ entails in which they occurred.

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“ The irritant and resolute clause appears to be
 “ exposed to the same fatal objection of not being
 “ expressly directed against the institute. It provides,
 “ that in case ‘ the heirs descending of my body, or
 “ ‘ any of the other heirs of tailzie before mentioned,
 “ ‘ shall contravene the prohibition, the acts of con-
 “ ‘ travention shall be null, and the contravener shall
 “ ‘ forfeit his right.’ The defenders maintain that as
 “ the institute, though not an heir of tailzie, is an heir
 “ descending of the entailer’s body, the clause is suffi-
 “ ciently broad to comprehend him ; but in that argu-
 “ ment the principle is overlooked, that while the
 “ construction to support the fetters of an entail must
 “ be of the strictest nature, the construction to break
 “ the fetters is directly the reverse. In the former,
 “ no aid can be obtained from inference or presumed
 “ intention ; in the latter, these are the sources from
 “ which the meaning of the words used may and ought
 “ to be collected.

“ By the clause of destination the estate is conveyed
 “ to heirs of two descriptions, one being heirs de-
 “ scending of the entailer’s body, and the other, heirs
 “ not descending of his body, but both, by virtue of

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“ the conveyance, heirs of entail. It is plain that the
 “ irritant and resolute clause is directed against both
 “ descriptions of heirs, and against them exclusively;
 “ it has no application to persons not being heirs of
 “ the entail, though heirs of the entailer’s body. It is
 “ very true that the entailer intended to fetter the
 “ institute as well as the heirs of entail, but he at-
 “ tempted to do so under the erroneous belief that
 “ the institute was an heir of entail, as is evidently
 “ demonstrated by a long series of provisions in the
 “ deed, and more especially by the clause relative to
 “ the cutting of timber. It is thought, therefore, to
 “ be contrary to the established rule of interpretation
 “ to hold the words ‘heirs descending of the body’
 “ in this clause as importing heirs of line, heirs of
 “ conquest, heirs in mobilibus, or any description of
 “ heirs, except heirs of entail, of whom alone there was
 “ any question in this deed: and, if that be so, the
 “ present case becomes identical with that of Dun-
 “ treath, and a numerous series of precedents to the
 “ same effect. On this point the case of Dougaldston
 “ on the one hand, and that of Baldastard on the
 “ other, afford an apt illustration. A person contra-
 “ vening in the one case, and a member of tailzie
 “ contravening in the other, are both terms in them-
 “ selves sufficiently comprehensive to include the
 “ institute as well as the heirs. But in the case of
 “ Dougaldston there was nothing in the context to
 “ limit the term person, so as to exclude the institute,
 “ whereas in the case of Baldastard it appeared by
 “ reasonable inference, from a comparison of various
 “ clauses, and from the whole structure of the deed,

“ that the term ‘members of tailzie’ was employed
 “ to denote heirs being members of tailzie. But the
 “ inference in this case is much clearer than in that
 “ of Baldastard; for it is undeniable, 1st, that Sir
 “ John Murray Macgregor, in the clause in question,
 “ had no heirs in contemplation but heirs of entail;
 “ and 2dly, that he conceived his son, Evan John, to
 “ be an heir of entail. The Lord Ordinary is aware
 “ that an opinion in the case of Bauch v. Murray, to
 “ which the highest respect is due, is opposed to what
 “ is now stated; but he cannot acquiesce in that view.
 “ The case of Baldastard shows that it is not enough
 “ that the entailer should have intended to fetter the
 “ institute, and that he made use of a term which, in
 “ one view, is large enough to include him, if it is
 “ clear from inference that he used that term in a
 “ different sense, and one totally inapplicable to the
 “ institute. The case of Bauch cannot be regarded
 “ as a precedent here, as the decision of the Inner
 “ House rests on a separate and unexceptionable
 “ ground.”

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The appellants reclaimed to the First Division of the
 Court, who ordered Cases to be laid before the whole
 judges with a view to determine the following ques-
 tions:—“ Whether the interlocutor of Lord Core-
 “ house, Ordinary, ought to be adhered to on both
 “ or either of the grounds, that in the entail founded
 “ on by the defender there is no prohibition against
 “ altering the order of succession, and that the irritant
 “ and resolute clause of that entail is not applicable
 “ to the institute; or on any other grounds? or,
 “ Whether the said interlocutor ought to be altered,

MACGREGORS “ and if altered what judgment ought to be pronounced
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¹ The following are the opinions delivered by the consulted judges.

Lords Justice-Clerk, Meadowbank, Fullerton, Moncreiff, Jeffrey, Cockburn, and Cuninghame.—“ This is an action by the pursuer for adjudging the lands mentioned in the summons, for a debt due to him by Sir Evan Macgregor, the proprietor in the fee of those lands. The defence stated for Sir Evan Macgregor, and for his eldest son as the next heir of entail is, that the estate is possessed by Sir Evan solely by virtue of a strict entail, whereby he is effectually restrained from contracting debts for which the estate may be adjudged, under the pain of irritancy or forfeiture, and all such debts are declared to be null and void, and adjudication for payment of them is declared to be incompetent.

“ The interlocutor of the Lord Ordinary, in general terms, repels the defences, and decerns in terms of the libel. And the material question now before the Court, and on which our opinion is required, is, whether that interlocutor ought to be adhered to, or altered.

“ From the pleadings of the parties, and the note of the Lord Ordinary, it appears that three points of law may be involved in this question. The pursuer maintains, that the entail founded on is essentially defective in two respects, in so far as it can be stated to have relation to the acts and deeds of Sir Evan Macgregor, the proprietor in the fee; 1. Because it contains no clause prohibiting him, as institute, from altering the order of succession; and, 2. Because the irritant and resolute clauses are not so conceived as to apply to him as the institute or disponent, but apply only to heirs of entail.

“ If the first of these points were established, it would constitute a very serious defect in the entail. But, in order to render the objection effectual to sustain the present action of adjudication, it requires that the Court should determine a third question, of more general and abstract law, viz., whether an entail which does not contain an effectual prohibition against altering the order of succession can be of any effect at all, even in those points in which it might be found to be in other respects technically correct and sufficient. The second objection taken to the sufficiency of the entail, if well founded, is at once decisive against the grounds of defence to the present action. For this is a question with onerous creditors proceeding to adjudge the estate for payment of their debts contracted by the proprietor in the fee. And the law has been long and well settled, that, unless the prohibitions of the entail, whether against selling or against contracting debts, are duly fortified, both by an irritant clause declaring the deeds done in contravention of them to be null and void, and by a resolute clause declaring that the party contravening shall forfeit all right to the estate, and unless these clauses are so expressed as to comprehend the acts of

The Court (11th March 1837), on advising the Cases and the opinions of the consulted judges, adhered

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“ the individual whose acts or deeds are objected to as contraventions,
“ they can be of no effect at all against the rights or the diligence of
“ onerous creditors or purchasers.

“ We therefore think it proper, in answer to the question, whether
“ the Lord Ordinary’s interlocutor ought to be adhered to or altered,
“ to direct our attention, in the first place, to this last point, viz.,
“ whether the irritant and resolute clauses are effectual against the
“ acts and deeds of Sir Evan Macgregor in the present case? And we
“ are of opinion, that they are not sufficient.

“ By the conception of the deed of entail it is quite clear, that the
“ estate is given to Sir Evan Macgregor directly as disponee or fiar, and
“ not as an heir or an heir of tailzie. The entailor disposes ‘ to myself
“ ‘ in life-rent, during all the days of my life, and to Evan John Mac-
“ ‘ gregor Murray,’ &c. ; whom failing, &c. &c. in fee. And, after the
“ cases of Wellwood, February 23, 1791; the Marchioness of Titchfield
“ v. Cuming, May 22, 1798; Miller v. Cathcart, February 12, 1799,
“ and other cases, there can be no doubt that these words constituted
“ Sir Evan the disponee, or institute, and not an heir of tailzie.

“ This being clear, the question, whether he is effectually put under
“ all the fetters and irritancies, depends on principles which have been
“ firmly settled ever since the decision of the House of Lords in the
“ case of Edmonstone of Duntreath. It is unnecessary to go into the
“ particulars of that well known case. The general rule laid down by
“ it is, that prohibitions or irritancies applied only to heirs of tailzie
“ do not affect the institute, however clear it may be, from other clauses
“ of the deed, or the general conception of it, that the entailor intended
“ to include the institute in the operation of the clauses. This rests on
“ the broad principle, that all such clauses are of the strictest construc-
“ tion, and therefore cannot be extended, by any implication of intention,
“ either to persons or to cases not expressly comprehended in them.
“ And this has been held so decidedly, that even words introduced
“ incidentally into the clauses themselves, which might seem to indicate
“ such an intention, or the use of words of an ambiguous nature, have
“ been always held not to be sufficient.

“ The general rule had been decided in two cases before the case of
“ Duntreath. But that important judgment has been followed by very
“ many cases, throughout which there has never for a moment been any
“ departure from the principle. Nice cases have arisen, in the question
“ whether the party was institute or heir of tailzie, such as Wellwood,
“ M’Culloch, &c. And nice cases have also arisen on the question,
“ whether special and express words used did apply to the institute or
“ not. But no doubt has ever existed, that, if the party were clearly

MACGREGORS to the interlocutor, except as to expenses; and of new
v.
BROWN. adjudged in terms of the libel.¹

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“ institute, and if the clause in question were not applied to him as
 “ institute, but applied to the heirs of tailzie, no words merely indicating
 “ that the entailer may have considered him as an heir of tailzie, and in
 “ that view intended him to be bound, will render the clause effectual
 “ against him. It is needless to go through the detail of all the cases.
 “ It is impossible to read the case of Wellwood, or the case of Titchfield,
 “ or the case of Miller v. Cathcart, or the case of Baldastard, without
 “ seeing that, if any implication of intention would have done, the en-
 “ tailer had indicated, in one and all of them, that he meant the institute
 “ to be bound, and considered him as an heir of tailzie as much as the
 “ substitutes named. But the principle of strict construction necessarily
 “ carried with it another rule, that the most liberal construction must be
 “ given in favour of liberty, so that any ambiguous words or loose ex-
 “ pressions, even introduced into the clauses, shall not be accepted instead
 “ of the direct words proper for imposing the fetters on the institute.
 “ For example, in the entail of Gordonstone, the prohibition was, that it
 “ should not be lawful ‘ to the heirs of tailzie above designed, male or
 “ ‘ female, nor to the heirs who shall happen to succeed to the lands and
 “ ‘ dignity,’ to do any of the prohibited acts, ‘ it being always understood,
 “ ‘ that although the before-named persons be designed heirs of tailzie,
 “ ‘ and he to succeed to my said estate as such,’ yet they shall have no
 “ greater powers than life-renters. The institute in that case was an heir
 “ of the entailer, and did succeed to the lands and dignity. But, in that
 “ entail, he was not an heir, but dispositive; and the restraining clauses
 “ being applied to heirs of tailzie, it was found that he was not bound by
 “ them.

“ So also in the case of Miller v. Cathcart, James Taylor, the institute,
 “ was named in many of the clauses as ‘ James Taylor and all the other
 “ ‘ heirs of entail,’ and in one clause it was said expressly, ‘ notwithstand-
 “ ‘ ing the before written conditions, limitations, and restrictions put
 “ ‘ upon the said James Taylor and the other before-mentioned heirs of
 “ ‘ entail,’ &c., power was given to the said heirs to do certain things.
 “ But the restraining, and irritant, and resolute clauses themselves were
 “ applied to heirs of tailzie; and it was therefore found ‘ that the said
 “ ‘ James Cathcart Taylor, being institute in the entail, was not affected
 “ ‘ by the fetters thereof;’ and, therefore, that the entail could not be
 “ pleaded in bar of payment of his debts.

“ The case of Baldastard was an extremely strong case, and particu-
 “ larly illustrative of the principle, that even the use of words in the

¹ 15 D., B., & M., p. 849.

Sir Evan Macgregor and his son appealed.

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Appellants.—In the entail there is a clear and valid

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“ disputed clause itself, which in some sense might include the institute, cannot be construed to have that effect if it appears from the connection in which they stand that they were merely used as a form of describing the heirs of tailzie. ‘Heirs and members of tailzie’ might in a popular sense comprehend the institute; but it was held, both here and in the House of Lords, that the word ‘members’ was limited by the connection in which it stood with ‘heirs,’ and therefore could not be taken as importing more than ‘heirs’ ‘being members’ of tailzie, and describing persons who were ‘members’ because they were ‘heirs.’

“ The few cases in which the institute has been found to be bound are cases in which the words employed, not only did directly apply to the institute, but could not, from the form in which they were used, admit of any other construction. So it was in the case of *Syme v. Ranaldson Dickson*, February 27, 1799, although that was certainly a nice case upon the resolute clause. But, while the prohibitions were expressly laid on the institute by name, the commencement of the irritant and resolute clauses expressly included him, running thus,— ‘in case my said son, or any of the heirs of tailzie, &c. should contravene, the deeds should be null, and the person or persons, heirs of tailzie foresaid, so contravening,’ &c. should forfeit. The case turned on the word ‘person’ in the singular number, which was held to stand apart from the words following it, and, in this view, necessarily to relate to the institute, the son, and to no one else. The late case of *Dougaldston* was perhaps clearer, though also not decided without difficulty. For the irritant and resolute clauses provided, that ‘in case the said Henry Glassford, or any of the heirs tailzie and provision substituted to him,’ should contravene, not only the deeds should be null, ‘but also each and every heir or person so contravening,’ should forfeit. The majority of the Court who decided that case held, that, from the context, it was impossible that the word ‘person’ could apply to any other person but Henry Glassford, the institute named in the beginning of the clause.

“ The ruling principle, however, was again recognised in the case of *Lord Elibank v. Murray*, July 2, 1833. Another case of importance was, indeed, decided on the same day, in which the Court, resting on a general clause, which was thought to express a positive intention that the whole clauses should be binding on William Morehead the institute, came to an opposite conclusion. But the House of Lords, even in that strong case, looking simply at the terms of the clause itself, which in its commencement was directed against heirs of tailzie alone, found that it did not reach the institute.

MACGREGOR v. BROWN: prohibitory clause applicable to the institute, and showing an intention on the entailer's part to place

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" We are aware, that the decision in the case of Baugh v. Murray, January 14, 1834, may seem to have involved a question of a somewhat similar nature with that which is now before the Court. But that case was taken up as a very special case. The judges were not agreed upon it; and while it does not appear from the report that the decisions on the subject were brought fully before them, there seems to have been an impression, that in the shape of the cause the Court were not under the necessity of deciding any point, except that nothing had been done to make the provision effectual against the entailed estate. At any rate, upon full consideration, we cannot hold that case to regulate the decision of the present case.

" Attending to the principles of the law universally recognised, and to the whole course of the decisions, we are of opinion that the irritant and resolute clauses in the present case cannot be held to affect the institute. The prohibitory clause against selling or contracting debt, no doubt, applies to him nominatim, as it did in several of the cases which have been referred to, and very remarkably in the case of Morehead. But the irritant and resolute clauses are very differently constructed. They run thus: ' That in case the heirs descending of my body, or any of the other heirs of tailzie before mentioned, shall contravene, &c., not only the deeds shall be null, and the estate shall not be affected by them, but also the person or persons so contravening shall forfeit all right, &c. It is perfectly clear that, unless the first words of these two clauses shall be held to comprehend the institute, there is neither a good irritant, nor a good resolute clause. For, independently of other cases, the same word ' person' was used in the resolute clause in the case of Morehead, and was found to be of no effect under much more difficult circumstances. It clearly would have been so found by the Court, but for the general clause, which alone raised the difficulty. But the first question here is, whether there is a good irritant clause, any defect in which is alone sufficient to support the judgment of the Lord Ordinary. If the words had run simply, ' In case any of the heirs of tailzie shall contravene,' the case would have been identical with Morehead in this point, without the difficulty of it; and there could have been no doubt of it. The only question is, whether, attending to the strict principle of the law, the prefixed words, in the connection in which they stand, can be held to alter the construction; ' That, in case the heirs descending of my body, or any of the other heirs of tailzie before mentioned,' &c. It is apparent that the words, ' the heirs descending of my body,' do not specially describe the institute. They describe a class of heirs belonging to this entail; for the case stated is that of the heirs con-

the institute under the same restrictions as the heirs of **MACGREGORS**
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“travening the entail. They have no reference to general descent by natural birth, or succession at common law, but have a special application to the matter of this entail, and nothing else. Yet it is of heirs only that the entail speaks—of heirs, no doubt, descending of his body, but of these heirs as heirs of tailzie, contradistinguished from the other heirs of tailzie called. There might be numerous classes of heirs of tailzie descending of the entailor's body, who are within the destination; and there might also be numerous classes of heirs of tailzie not descending of his body, within it. And what he says is, that, if the heirs descending of his body, or any of the other heirs of tailzie before mentioned, shall contravene, the nullity and forfeiture shall take place.

“We are of opinion, that, in consistency with the principles which have been held in all the cases since *Duntreath*, the words ‘the heirs descending of my body,’ can only be construed to mean such heirs of his body as were heirs of entail, and so might be distinguished from the other heirs of tailzie. And it appears to us, that to construe the term ‘heirs’ in this entail as specifically designating the institute, merely because he is in fact an heir of the entailor's body, would not be reconcileable with the principles on which so many previous cases have been determined. He is not an heir in this entail. He does not take the estate by service as an heir; and though a description here given of other persons who are heirs, and who are also heirs of tailzie, might comprehend him in a natural sense, it does not at all comprehend him in any relation to the right or the character by which he has taken and possesses the estate in question.

“Having come to a decided opinion, that the irritant and resolute clauses do not affect Sir Evan M'Gregor, and therefore that the entail cannot be pleaded against the debts contracted by him, or the diligence of his creditors, we do not think it necessary to decide also on the objection taken, that there is no sufficient clause against altering the order of succession, or on the abstract question raised as to the effect of that objection in the present action, supposing it to be well founded. On the ground which we have fully explained, we are of opinion, that the pursuer is entitled to decree in his action, and that the interlocutor of the Lord Ordinary ought to be adhered to.”

Lord Glenlee.—“Although I cannot take it upon me to dissent from the foregoing opinion, yet it is not without great hesitation that I concur in it; because I doubt very much whether the principle which governed the *Duntreath* case, and various others, can justly be applied to this individual case.

“I understand very well, that if the tailzie applies the irritancies to persons described by an established and known technical designation,

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In the irritant and resolute clauses introduced in relation to the prohibitory clause, and intended to

" we are not by implication to consider any person as included in the
" designation, other than those which fall under it according to its
" proper technical meaning. But if the tailzie does not apply the
" irritancies to a description of persons so worded, as in itself, and without
" interpretation, to point out clearly who they are, and if we are at all
" obliged to find out this by implication and presumptions of intention,
" it ought to be *tota lege perspecta*, that we form our judgment on the
" matter.

" Now, the irritant clause in this case is not directed simply against
" 'any of the heirs of tailzie,' but against 'any of the heirs of tailzie
" 'before mentioned,' which throws us back to the prohibitory clause.

" The first prohibition, which is against alienations, &c. &c., is directed
" against the institute, and first substitute nominatim, and the 'other
" 'heirs of tailzie substituted to me in manner foressaid, and succeeding
" 'to my said lands.'

" The remaining prohibitions appear to be directed against the heirs
" of tailzie as above described, that is, the 'heirs of tailzie substituted to
" 'the maker of the entail.' Now, as there is not, technically speaking,
" any person in the whole tailzie who is an heir substituted to the maker
" of the entail, we are forced, from implication and presumption, to in-
" terpret his meaning; and I do not see why, considering his peculiar
" mode of expression, we are to confine that meaning to heirs of tailzie,
" properly so called, and not to include, as he himself evidently intended,
" the institute as well as them; and, in short, as signifying the whole
" persons called to the succession."

(Lord Medwyn, being interested in the cause, gave no opinion.)

Notes of the opinions of the Judges of the First Division of the Court.

Lord Mackenzie.—I have read the opinions of the consulted judges with great care, and although my own opinion in this case is greatly shaken, yet I am not able to say I have changed it, nor can I adopt the opinion that has been given by the consulted judges. I shall express my views, however, very briefly.

The entailor calls all his descendants, beginning with his eldest son, going through his younger sons, and ending with, 'whom all failing, the heirs whatsoever of my body.' He then, in the irritant clause, applies the irritancy first to the 'heirs descending of my body.' That expression, if taken by itself, is quite sufficient to include and express the institute. It means clearly all persons being his heirs by descent from his body,—that is, all his descendants. It is void of ambiguity or technical difficulty. How then do you limit it? By adding to it the words, 'or other heirs of entail,' and then applying to the clause a



fence it, the language used is not, as in the Duntreath case, of a limited character, technically excluding the institute, but the leading class of persons named are the heirs descending of the granter's body generally, a description sufficient to comprehend naturally and accurately the institute of the entail, being as he is the granter's immediate descendant, and only son and heir, and a description legally and properly comprehending that person, unless upon other sufficient grounds he appear to be excluded from it.

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In considering whether the institute, being the entailor's son and heir, is excluded from this applicable and comprehensive description, it lies with the respondent to make out that exclusion, and it is not sufficient for that purpose to raise verbal conjectures as to possible or probable inaccuracies into which the

sort of interpretation that I think is here used for the first time. In the first place, by the strict verbal reading of the Duntreath case, rejecting inference, you take the words 'heirs of entail' as standing alone, and so hold that expression to exclude the institute. Then, secondly, you have recourse to free construction, and by inference from the words 'or other heirs of entail,' you conclude that the entailor, in using the words 'heirs descending of my body,' meant only heirs of entail, and so you arrive at a conclusion in certain defeasance of the entailor's true meaning. Now, I am not able to adopt this kind of what I may call double-dealing interpretation, applying both rigid verbal interpretation, and free interpretation by inference to the same sentence. I know of no example of this. The Duntreath case, and the cases following it, afford none. I think you may interpret, word by word, as in these cases, rejecting inference and explanation of one word by another; but you cannot, at the same moment, adopt inference from the very words which you have, by rejection of inference, interpreted in a way contrary to the entailor's meaning. Perhaps, it would be sufficient to say, that if you adopt free construction at all, you must look to the entailor's true meaning, and nothing else, and cannot defeat that meaning by free interpretation of any kind.

Lords President, Gillies, and Corehouse, expressed their concurrence in the opinions of the consulted judges.

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entailer might have fallen in using more ample expressions, but the only question is, whether in connection with all the material parts of the deed, it was the entailer's intention and purpose so to exclude his son from the application of the phrase in question?

There are no sufficient grounds for holding that the entailer did mean to exclude his son from the class of persons described as 'the heirs descending from his body;' but, on the contrary there are grounds for holding that he intended to include him in that class; and the generality of the phrase used being unrestrained by any opposite intention in the entailer's mind, and indeed supported by that intention, must receive its full legal effect and interpretation.

Thus, there being a sufficient prohibitory clause directed specially against the institute, and sufficient irritant and resolute clauses to include the institute, the entail is effectual in all essential parts, and more especially as a restraint upon selling and contracting debt, and cannot be defeated by the respondent's diligence.¹

Respondent.—If there be any one principle which can now be regarded as firmly and authoritatively settled in the law of Scotland, it is that of strict construction in the matter of entails. The law does not, as in the

¹*Authorities.*—Edmonstone, 24th Nov. 1769, (4409) reversed 16th April 1770; Leslie, 1752, Elch. v. Taillie, No. 49; Erakine, 14th Feb. 1755 (4406), L. Elibank, 2d July 1833, 11 S., D., & B., p. 858, affirmed 19th March 1835, 1 S. & M. Appeal Cases 1; Morehead, 2d July 1833, 11 S., D., & B., p. 863, reversed 31st March 1835 (1 S. & M. Appeal Cases, p. 29); Dick, 14th Jan. 1812, F. C.; Bruce, 15th Jan. 1799 (15539); Barclay, 18th May 1821 (1 Shaw, Appeal Cases, No. 8.)

interpretation of wills and other more favoured instruments, lend itself to aid the granter's purposes, by gathering his intention from a view of the general scope and tenor of his whole deed, so as to supply by presumption or implication, any thing not appearing on the face of it in direct, clear, and unambiguous language. On the contrary, the law rejects all presumption, however strong, and allows no restrictions to be created or extended by way of inference, whether as regards the particular acts which form the subject of the prohibitions, or the persons on whom the fetters are to be imposed. In every case where a man has made an entail "for the maintenance and preservation of his name and family," which is the usual inductive cause of such settlements, providing his estate, to a number of persons in succession, under prohibition to sell or contract debt, or alter the investiture, and with irritant and resolute clauses framed for the protection of these prohibitions, the plain presumption, in the absence of any express declaration to the contrary, will of course be that he has intended the restrictions to apply to every one of the prohibited acts, and to be binding on all and each of the parties included in the destination. If this view of the law be correct, the present entail cannot be pleaded against the debts and deeds of the appellant, who is the institute or first disponent; because the irritant and resolute clauses, which are essentially necessary for enforcing the prohibitions, are not so expressed so as to reach or affect him.

The terms used in the present case are not precisely identical with those which occurred in the case of *Duntreath*, and no question has yet been tried as to

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MACGREGORS the effect of a clause conceived in the exact form of
v.
BROWN. words which the entailer has here employed; and an
 12th Feb. 1838. examination of some of the leading decisions will be
 sufficient to show the complete identity of this case, in
 principle, with all those in which it has been found that
 the institute is not affected by the fetters when they are
 in terms imposed solely upon the heirs.

The point established by these cases is, that restrictions directed exclusively against the heirs do not affect the institute, because in a proper legal sense the institute is not an heir, but a disponent, who takes as singular successor of the granter, while the heirs require the intervention of a service in order to complete their title. The rule founded upon this distinction has been uniformly applied, even where it has been clear, as indeed in almost every case it has been, that the entailer, in imposing fetters upon the heirs, truly meant to include the institute, erroneously supposing him to be one of that class of persons. It matters not though the entailer may have spoken of the institute in conjunction with the heirs of entail, in such a way as to show that he was not aware of any difference in their legal characters, and consequently to leave the irresistible inference, that when he laid restraints upon the heirs he intended, under that designation, to restrain all the persons called to his succession, whether as heirs or disponents.¹

¹ *Authorities*—*Leslie v. Leslies*, 24th July and 5th Dec. 1752; *Elchies, Tailzie*, No. 49; *Erakine v. Hay Balfour*, 14th Feb. 1758, Mor. 4406; *Wellwoods v. Wellwoods*, 14th Feb. 1791, Mor. 15463; *Gordon v. McCulloch*, 24th Feb. 1791, Bell, p. 180; *Mackenzie v. Mackenzie*, 24th Nov. 1818, Fac. Coll.; *Gordon v. Lindsay Hay*, 8th July 1799,

But this is not all. The objection to the irritant clause stands upon much higher and stronger grounds than any which can be derived from a mere view of the entailor's intention. Assuming, but not admitting, that he intended the expression "heirs "descending from my body" to have a special application to the institute, and to all his other descendants, in their character of his legal representatives merely, and without any reference to their situation under the entail, still it is denied that these words can have the effect of binding the institute. For the term "heir" is one of a very flexible nature, having a variety of different meanings according to the circumstances in which it is used. It signifies at one time the heir of line or most general representative, at another the heir of conquest; in the case of a personal succession it denotes the executor or heir in mobilibus; but in the language of an entail it can be applied to no other parties except those who are called by the destination to succeed after the institute or disponent. It is in consequence of the fixed and unalterable signification thus attached to the term of entails, that the institute is never, in the construction of deeds of that description, held to be affected by fetters imposed only upon heirs. However plainly the granter may have evinced his intention to bind him simply as an heir, he cannot

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Mor. 15462, Ap. 1, Tailzie, No. 2; Marchioness of Tichfield v. Cumming, 22d May 1798, Mor. 15467; Miller v. Cathcart, 12th Feb. 1799, Mor. 15471; Steel v. Steel, 12th May 1814, Fac. Coll., affirmed 24th June 1817, Dow's App. vol. v. p. 83; Murray v. L. Elibank, 19th March 1835, (1 S. & M. App. C.); Morehead v. Morehead, 31st March 1835, 1 S. & M. App. Ca.

MACGREGOR do so because the rule is absolute, and admits of no
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These points being clear, it only remains to be inquired what are the grounds for maintaining that the word "heirs," as it is used and qualified in this entail by the adjection of the term "descending of my body," is to be held in contradiction to the general rule, sufficient to reach and include the institute. If the whole expression as it stands be one which necessarily and by force of definition comprehends him, so as to compel a party reading it to read "my son, the institute, and all the other heirs descending of my body," then undoubtedly he is effectually bound, and the estate is protected against his acts and deeds. But if on the other hand it fall short of this, if it do not point to the institute, and mark him out by plain, direct, and necessary implication, if it leave any thing to be supplied by a presumption of what the granter intended, then the entail is so far defective, and the question as regards the institute is brought immediately within the principle of the cases of Duntreath and Wellwood, and the rest which have been so solemnly decided.

Now, it has already been shown that the expression has a distinct and substantive meaning, independently of any application to the institute, there being a numerous series of heirs to whom, in their character of lineal descendants, it most naturally refers. They are heirs descending of the granter, and they are also heirs of his entail. But the institute is not an heir

¹ Gordon v. Lindsay, 8th July 1776 and 22d May 1798, Mor. 15467, App. 1, Tailzie, No. 2.

under the entail. He is his father's heir, it is true, in a general sense; he is his heir of line, and as such has actually represented him, but he is not an heir at all in the sense of this deed. The term "heirs," as a term of common law, is at least as comprehensive in its meaning as "heirs descending of my body;" since, whether the subject of the succession be heritage or moveables, it is the descendants of the body, who in the absence of any special distinction to the contrary are entitled to succeed as heirs in the first place. If therefore, it be sound construction to say that the institute is here effectually fettered under the description of an "heir descending of my body," the same rule of construction must hold good wherever the expression is simply "heirs," without any mention of those heirs being heirs of entail. But that very point was decided in the case of Gordonston in favour of the institute's freedom, and in circumstances which may be considered as peculiarly strong for holding him bound. He was the eldest son and heir of the granter, just as certainly as the institute in this case is. He, too, like Sir Evan Macgregor, succeeded his father in a title of baronetcy, and the restrictions which gave rise to the question of his right to defeat the entail were directed not only against "the heirs of taillie," but also against "the heirs who shall happen to succeed to the said lands and dignity." If the term "heirs" could in any case have been deemed sufficient to include the institute, it must have received effect in that instance, for the "heirs" spoken of in the last member of the clause were not described as heirs of taillie; there was even room for arguing that they were distinguished from that class, and that the institute, as heir

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to the dignity, was clearly designed and brought within the fetters; but the Court decided otherwise, and the only intelligible reason for the decision, the correctness of which has never been called in question, is, that the term "heirs" must always be construed with reference to the nature and quality of the deed in which it occurs. It is in vain, therefore, to say that "heirs descending of my body" is to be taken as a legal phrase specifically descriptive of the institute, merely because he is in fact a descendant of the entailer, and in common language one of his heirs.

It is almost needless to mention the various forms of expression, by means of which the institute might have been effectually designed without being actually named. Had the clauses of irritancy and forfeiture been directed, after a distinct and separate mention of the institute and of the heirs, against "the person or persons heirs of taillie aforesaid," as was the style in the case of Syme against Ronaldson Dickson¹,—or, as in the Dougaldston case², against "each and every heir or person contravening,"—the use of the general and comprehensive term person would have been sufficient to protect the entail against the institute's acts and deeds. In like manner, "all the persons descending of my body," would, by necessary implication, have included the institute as one of the descendants. Had the entailer chosen to designate him more particularly, he might have said, "my eldest son, and all the heirs descending of my body," or he might have introduced

¹ 27th Feb. 1799, Morr. 15473.

² Douglas v. Glassford, 10th June 1825, 5 W. & Shaw's App. Cases, 323; Baugh v. Baugh, 14th Jan. 1834, 12 Sh., D., & B., 279.

a clause de verborum interpretatione, declaring that by heirs descending of his body, he positively understood and comprehended the institute. Such a clause would have been obligatory in construction, as giving an explicit definition of the terms which the entailer used. Or it would have been sufficient if he had said, "my heir of line," or "my heir general,"—because each of these is a well known legal term, denoting a precise and definite character, which can belong only to a single individual at any one time, and that individual would in the present case undoubtedly have been Sir Evan Macgregor, the institute of entail. In short, the purpose might have been effected by employing either direct description or general reference, or words of such a fixed technical meaning as to be incapable of being altered or modified by the nature of the deed wherein they occurred. But none of those modes of expression has been here employed, and though the entailer may have intended to include the institute under the designation of an "heir descending of his body," he has not effectually done so, because, according to the recognised rules of construction, and without any implication, that term must necessarily be restricted, in an instrument of this kind, to mean "heirs of tailie" properly so called. These may appear at first sight to be very slender and trivial distinctions, but they are, in truth, of the highest importance, and must be so considered as long as any value is attached to strict accuracy in legal expression. It is upon such distinctions that many of the nicest and most difficult questions have arisen in the law of entail, and they cannot be disregarded without unsettling the whole course of the authorities and decisions.

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LORD BROUGHAM.—My Lords, in this case a question arises, which it is not necessary to trouble your Lordships by stating more fully than to observe that it arises entirely upon the construction of a Scotch deed of entail, and on one part particularly of that instrument. It is admitted on all hands, or at least it is no where made subject of controversy in the cause, that the prohibitory clause must be valid, as well as the irritant and resolute, in order to render the irritant and resolute clauses valid and effectual. But the question in this case arises upon the sufficiency of the irritant clause. Whether or not that clause be sufficient to fetter the institute or disponee is the only question between the parties. This question was argued with great ability and learning on both sides of the bar; and it remains for your Lordships to decide whether you will affirm or reverse the decision of the Court below, sanctioned by the opinions of twelve of the learned judges, one having been prevented taking a part in the question by being a party interested as a trustee in the cause, and two only dissenting from that opinion,—whether you will establish the decision of the twelve, or establish the principle sanctioned by the two learned judges. Upon a full consideration of this case, I am prepared to advise, and I believe my noble and learned friend concurs in the opinion, that there can be no doubt that a right judgment has been pronounced in the Court below, and that your Lordships ought to affirm that judgment.

My Lords, the words in the irritant clause, upon which the whole question arises, are these: “that in case the heirs descending of my body, or any other of the heirs of taillie before mentioned, shall contra-

“vene any one of the particulars above specified,” and so on, “it shall be void,” and that the rights shall be forfeited, and so on. The question, therefore, is, whether the expression, “heirs descending of my body,” includes the institute, the first disponee, or the first taker of the estate under the deed of tailzie. It is perfectly established in the Scotch law, by a train of decisions which have been sanctioned by repeated decisions in the last resort, that under the words “heir of taillie,” the institute, or first taker, shall not be considered to be included; that he is not an heir of taillie; that he takes by purchase, and not by virtue of the grant in taillie; that he stands in a perfectly different position, in respect of the succession, from the stirps,—from that in which the heirs of tailzie stand. The stirps from which all the heirs of tailzie spring and become heirs of taillie is the maker of the entail. The disponee or feoffee takes the fee, subject to the restrictions which are imposed as to devolution or descent; he takes not as an heir of entail from the stirps, but he is as it were a sort of stirps,—he is a sort of new stirps. The rules of conveyancing, and as to service of the heir, clearly show that he is the stirps, and of whom the others spring, and that the heirs of entail are those who spring from him, the institute or feoffee, as their stirps, from whom the heirs of entail proceed.

Now, my Lords, it is perfectly understood, that under the words “heirs of tailzie,” the institute is not comprehended,—that no prohibition levelled at them would prohibit him,—that no irritancy denounced with respect to their acts, the acts of the heirs of tailzie, would be an irritancy with regard to his acts,—that if

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they be validly prevented selling the entailed estate, he is not validly prevented, because they are but being understood. A step further has been gone in later decisions, and I allude to the case of *Steel v. Steel*, commonly called the Baldastard case, which Lord Eldon disposed of according to the strict rules of Scotch conveyancing. It was there held in the Court below, and affirmed by your Lordships, that the institute was not included in the term "the heirs and members of "tailzie;" and I beg to state distinctly, that it is not correct to take that view of the decision of the Baldastard case, which was attempted to be taken at the bar, as if "members of tailzie," standing alone, would include "the institute;" and it was only prevented including the institute by the word "heirs" being added. That was not the principle of the decision in the Baldastard case. It is not correct to say,—and that really must be carefully attended to, otherwise it would go down to Scotland as if the Baldastard case had been decided upon the principle—that a man might fetter his institute by the word "heirs of tailzie," if he did not use the word "heirs" in connexion with the words "members of tailzie;" and Lord Eldon is misrepresented in the report, if it is stated that he represented this as the ground that "members of tailzie" have this meaning, unless as that it is modified or controlled by the juxta-position in which those words are found in the deed of entail with "heirs of tailzie." I take it to be clear that according to the principle of the case, that supposing "heirs" had not been objected to, members of tailzie would not have included the institute. The word "tailzie" is the material word, for he is not a member of tailzie; he is no more a

member of tailzie than he is an heir of tailzie; **MACGREGORS**
 he is the first disponee, or first taker by purchase, **BROWN.**
 and is neither an heir of tailzie nor a member of **12th Feb. 1838.**
 tailzie.

That being the established Scotch law upon this point, it remains only to ask the question here first whether (although he be not struck by the words "heirs descending of my body")—the question is, whether "heirs descending of my body," if it stood alone, would fetter the institute? and if that question is answered in the affirmative, and against the decision in the Court below, there still would remain the question on the plain construction of these words, whether "heirs descending of my body," or any others being added to the words "heirs of tailzie," do not ride over all the antecedents, and consequently convert this into a double use of the phrase, as if the words "of tailzie" had been twice repeated,—“heirs of ‘tailzie descending of my body,’ or any of the other heirs of tailzie; for it is never to be lost sight of, that this tailzie contains a limitation, first to the heirs of my body, taking them in the general, and secondly, to other heirs collateral, namely the heirs of his body and the heirs of his second brother, who are named; and even the general clause, in which it is all wound up, and the limitations around it, include heirs whatsoever, none of whom would be heirs of the body of such an entail, but they would be all heirs of tailzie; consequently, the persons to whom all these expressions relate consist of heirs of tailzie descending of my body, and any other heirs of taillie,—the general heirs of tailzie not of my body. Those, my Lords, are the two questions. I will dispose of the last first.

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It appears to me, looking to the natural construction of these words,—and I think it is not only the natural, but even the most literal construction, and if it be the most natural and the most literal construction, then, *cadit questio*, for it is quite clear that he is not an heir of *taille*; it is equally clear that he is not an heir of *taille* of the body, for he is no more an heir of *taille* of the body than he is an heir of *taille* generally; the institute can be struck at by neither term. But, my Lords, it is fit that we shall go into the more general argument; for it is upon that, that reliance has been placed, and upon which the question turned, and was decided in the Court below. I shall therefore shortly state my opinion to your Lordships upon that question. It is my opinion that if it had stopped there, it could not strike at or fetter the institute; I am clearly of that opinion. Is the institute an heir? In the first place, all principle and all the cases go against that. Is he an heir of the body? No. Is he an heir descending of the body? In like manner, No; quite clearly he was the disponent; he takes the fee, as all heirs of entail do in Scotland, in a succession of fee simples, only limited by any enjoyment and any fetters which may be interposed and limited as to descend only as the ordinary heirs of the person who takes the first fee. The disponent or institute is not, in legal intendment, the heir, or the heir of the body, or an heir descending of the body. It is not necessary, it is admitted on all hands not to be necessary, that you should, in order to fetter the institute, use any peculiar or technical phrase. You are not bound to say “institute,” you are not bound to say “disponent,” you are not bound to say “first taker,” you are not bound to name him by

his name, but, as I take the liberty to state, it has never been disputed here, or in the Court below, in any one of the cases, that he does not come under the description of heir, or heir of tailie; but he must, in order to be struck at and validly fettered by the entail, be named or referred to plainly in such manner as clearly to show that he, the individual institute, is referred to and struck at in the same manner as if he took by the name of heir of the father, if the designation had been, for instance, sons. There are various expressions that would have struck at him. If it had said in the instrument, "if any of my sons," or "any of my issue," or "any of my children," or even if it had been "one of my descendants," or "a person descending from me," or "any individual of my blood or race," all these phrases would have been words of purchase, and not of limitation, and they would have given an estate to him in his capacity of purchaser, and would have fettered him in respect of the use of that estate. But that is not in the least like "heirs descending of my body," because "heirs" is here the word used in the instrument of entail; and though the words "heirs of my body," if not in an instrument of entail, have a perfectly known sense in law, and according to the canons of descent mean the first son, and after him the second son, and after that second son then the daughters in coparcenery, and so forth, Yet here, dealing with the construction of the words in an instrument of entail, it is to be remarked that they are to be found in that part of the instrument which occurs after the whole of the designation clauses have been gone through, and after the persons have been enumerated, the parties being stated as those who are

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MACGREGORS to take in succession one after another; consequently
v. those persons have been all named as heirs, among
BROWN. others the heirs of the body of the taker have been
 12th Feb. 1838. named. And how have they been named? As heirs
 in the one case, and as heirs of the body in the other.
 But they have been named as heirs of taillie, and consequently, in dealing with the expression "heirs descending of my body" in the instrument, reference must be had to the antecedent part in which they have been stated not only to have been heirs of the body, but heirs ~~qui~~-ad hoc,—who were to take the entailed estate; consequently, in other words, the heirs of taillie.

My Lords, these appear to me to be perfectly clear principles of construction,—clear inferences from those principles, I rather ought to say, which flow from the decisions in the former cases. It appears to me this case could not stand, if it had been decided otherwise, with the Duntreath case. I do not see how that case could stand with this case. If, explained as I have taken leave to explain it, it had been disposed of otherwise than it was in the Court below. The Duntreath case has been represented as laying down the law too closely; but it is perfectly clear that it had laid down no new law; that the Court of Session had abandoned the law, perhaps, under the pressure of the hardship in the case; or under a wish the better to support the entails, they had deviated from the law which had been growing up ever since the act of the year 1685 had become the subject of judicial decision, and the construction of which, in later decisions, had been laid down differently from the construction put upon it in the Duntreath case in the Court below. And it is per-

fectly clear that if the House of Lords, acting under the advice of Lord Mansfield, had come to a different decision from that to which they came, they would have changed the law of entail in Scotland, and would have repealed, I will not say the act, for that could not be done; but, as we are all aware, the law of entail does not depend so much upon the act as upon the decisions upon that act. It is felt, both in Scotland and here, that no man can discover the law from the act, in which the word "institute" is not mentioned. If the Duntreath case is law, it is clear the appellant in the present case is not an heir of entail. That being so, it is clear the decisions of the former cases could not have stood, — ~~I will not say the act, but~~ the decisions upon the act, — ~~if this case had been otherwise decided than it was.~~

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The Duntreath case, as your Lordships are aware, affirmed the doctrine which had been laid down in the case of *Leslie v. Leslie*, commonly called the *Findrassie* case; that case had laid down the self-same rule clearly and explicitly. If the judgment in the Duntreath case had not been reversed, the *Findrassie* case was no longer law; that is perfectly certain. Upon that ground, case after case has been decided in the Court below and here; and the decision in the Duntreath case, though overruling the opinion of the then majority of the Court below, has been held ever since to be law, as *Shelly's* case, and others, have ever since their decision been considered as giving the law of England. If the Duntreath case had been otherwise decided than it was by this House, the *Findrassie* case in Scotland would no more be law than *Shelly's* case would have been law in England if *Perrin v. Blake*, which happened in

MACGREGOR later times, had been decided in favour of a tenancy
v.
BROWN. for life against that which was the decision in that case
 12th Feb. 1838. for a tenancy in tail. That would really have been exactly the same case; it would have almost broken in upon the rule in Shelly's case, as the Duntreath case would have broken in upon the rule in Scotland if the decision in the Court below in the Duntreath case had not been overruled.

My Lords, I feel myself bound to say more in consequence of Lord Eldon having been represented to have doubted the Duntreath case, and to have thrown a kind of discredit upon it. He did no such thing. I have heard Lord Eldon twenty times over, in this House, express his opinion that the Duntreath case was the canon of the Scotch law; and all he said in the Baldastard case (*Steel v. Steel*) was, that it surprised him when he first saw it; but he never meant to say that when he came to consider it his surprise was not lessened, or that he would not have been surprised if they had decided the other way. On looking at the former cases he never could have felt so. But I am the more anxious to state this, because this is one of those cases in which your Lordships have been advised to differ from the Court below in respect of a law peculiar to that country and their technical law. It happened that three years ago, namely, in the year 1835, I was compelled to call upon your Lordships to reverse a decision pronounced by a very great majority of the Court below upon the same question in the case of *Morehead v. Morehead*, commonly called the *Herbertshire* case, in which their Lordships, after sixty years following the Duntreath case, in deference to this House, and to their own knowledge of their own law, had all

at once departed from it again; they were going as widely in the Herbertshire case as Lord Mansfield had sixty years before done in the Duntreath case. I felt absolutely bound, therefore, to enter at great length into the merits of that case, and to call upon your Lordships to reverse that decision, which you did; and it has been a source of great satisfaction to me to learn that their Lordships in the Court below have come to the opinion that this decision was right, and that the decision in the Court below was wrong, that we restored the law again to its proper state. Several of the learned judges of that Court have very candidly admitted to me that we were right, and that the Duntreath case, and the other cases to which I have adverted, could not have been allowed to continue law if we had not reversed that decision in the Herbertshire case.

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My Lords, it only remains that I should say one word with regard to a case which has been decided, for the other cases are not necessary to be considered. The case of *Syme v. Ronaldson Dickson* is a clear case, in which, not by mere implication, but by the plainest reference which can be conceived, the institute is struck at, and all but named; he is all but called the instituta. If you look at the construction of that sentence the decision could not possibly have been otherwise in *Syme v. Dickson*. But the case to which I wish to refer is the *Gordonston* case in 1799, and which was brought here. That is quite as strong a case as the present; it is not correct to say that this case goes one hair's breadth further in advance of former cases, and particularly the *Findrassie* and the *Duntreath* cases, than the *Gordonston* case goes. For what was that? The

MACGREGOR question was, whether the institute was to be held to
BROWN. be fettered by the words "persons succeeding to the
 12th Feb. 1838. lands and dignity," which was a baronetcy. Now, under the words "persons succeeding to the lands," heirs of taillie, no doubt, would be implied, and consequently it might be said that the institute was not struck at by that. But persons succeeding to a baronetcy could not succeed by force of the entail, consequently that was *designatio personæ*; the words are words of purchase; the person succeeding to the baronetcy indicates that the individual takes not by the words of the entail, with which a baronetcy has nothing to do, but by the words of the letters patent of the crown. Nevertheless the Court below,—and the decision was here affirmed,—held that that did not strike at the institute, but that those words were to be taken as if they were coincident to "heirs of taillie," which did not fetter the institute.

My Lords, I have stated that the great majority of the judges in the court below came to the decision in question. It remains to be added that two learned judges of great learning and of great weight took part on the opposite side, and came to what I consider a very erroneous opinion. It is admitted on all hands, that Lord Glenlee's opinion cannot stand for a moment; for his argument upon the institute being included as an "heir of taillie" before mentioned, would unsettle the whole law; and it was admitted at the bar by the learned counsel, particularly the Attorney General, that they could not say a word in support of that opinion. Then my Lord Mackenzie's opinion rests upon this,—and a great fallacy most undoubtedly it is for so able a man: he says you are applying two different rules of

construction; here you are jumping about from one thing to another. At one part of the entail you apply a rigorous construction, and at another part you are applying a lax construction;—a rigorous construction in favour of the fetters on the one part, and a lax construction in favour of the liberty of the heirs of entail on the other. To be sure you are; but that is not wrong; it is not inconsistent with principle; on the contrary, that is the very principle of the law of entail. Wherever the question is, shall you extend the fetters? you are in favour of the freedom of construction; wherever the question is, shall you extend the freedom—shall you extend the powers—shall you extend the licence given to the parties? in that case you are on the other hand lax. You take exactly one way or another according as you are dealing with the fetters or with the powers; according as you are dealing with the restrictive or with the enabling part of the deed. And instead of that being an anomaly and an inconsistency, that principle runs through the whole of the Scotch law in the construction of instruments.

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Then, with respect to the case of Baugh v. Murray, which is the only one referred to in support of the argument of this appellant, that stands in peculiar circumstances, being a decision of the learned judge, Lord Mackenzie himself. It is a decision somewhat of the nature of a *nisi prius* decision of a single judge, which was never supported by the Court, but which, when it was brought before the Court, was very much cavilled at. The Court threw every discredit upon it, and said that they affirmed his judgment, but not upon those grounds; and they took a perfectly different view of the case from him on that point on which the case

MACGREGOR had been decided. I therefore look upon *Baugh v.*
v. *Murray* as no case whatever, and as not coming at all
BROWN. into contact with the weight of authority on the other
 18th Feb. 1838. side, more particularly the *Gordonston* case, which goes
 to the full as far as the present.

My Lords, upon the whole, though I was at first disposed to think the decision in this case goes a step further than that in the *Duntreath* case, I do not on consideration think it goes further at all; but I am quite certain that if it does go further it goes in the same direction, and upon principles short of which you cannot stop in this case; and of this I am clear, that it does not go so much further in advance of that case as the decision in the *Gordonston* case. Upon the whole, I have no hesitation in advising your Lordships to affirm this decision; and I should not have gone so far into the case, but for the part I took in 1835 in some other cases—the *Elibank* case, the *Herbertshire* case, and another case, heard first before the Lord Chief Justice of the Court of King's Bench, and afterwards heard before the Lord Chief Justice, the present Lord Chief Baron, and myself, in which we all concurred in reversing the judgment of the Court below. It is of high importance that the law of real property should not vary from time to time; should not bend according to circumstances; should not be flexible, above all, according to the hardship of any particular case. If it were to be so, I must say a harder case than this I have not often known; but if the law be a bad one it ought to be changed in the regular way by the legislature, certainly not by overruling former decisions.

My Lords, I think as the Court were of different opinions, and this is a hard case—a suit by a creditor

against the heir, and a case very fit to be brought here for argument,—I should humbly propose to your Lordships to say nothing about costs.

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LORD CHANCELLOR.—My Lords, I entirely concur in the opinion which has been expressed by my noble and learned friend. I shall very shortly state to your Lordships the grounds upon which I come to that conclusion. My Lords, several points were taken in the Court below, but at your Lordships bar the case was reduced to one single point. It is not disputed that Sir Evan Macgregor is the heir of the entailer, that he is in this deed of entail to be considered as the institute or disponee under the deed of entail. It is clear from the authorities that the institute or disponee is not fettered unless he is included in the irritant clauses in question, though he be included by name in some of the provisions of the prohibitory clauses. It is also clear from the authorities that he is not to be considered as included in the irritant clauses, unless he is either named therein, or unless some designations are to be found in that clause necessarily including him; that expressions which in themselves may or may not include the institute, are not to be held as including him, because it is to be inferred from those of similar expressions in other parts of the deed that they were intended to include him. In the case of *Steel v. Steel*, Lord Eldon, referring to the *Duntreath* case decided in this House, stated this to have been the acknowledged rule and principle, at least from the date of that case. Upon that rule and principle this House acted in that case of *Steel v. Steel*, and in the more recent cases of *Lord Elibank v. Murray*, and *Morehead v. Morehead* in 1835.

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My Lords, after those decisions in this House, and the uniform acting upon this rule and principle by the Court of Session, it is not very material to inquire into particular cases which may have occurred, in which doubts may have arisen as to the meaning of particular words used in cases in which there was never any intention of departing from the rule so laid down. The only question therefore is, whether the circumstances of this case bring it within that rule and principle? Now, my Lords, it appears that Sir Evan Macgregor was the eldest son of the author of the entail, and the designation is to himself in "life-rent," and to Sir Evan Macgregor his only son in fee, whom failing to John Athol Macgregor his grandson, and the heirs male of his body, whom failing to various other classes of persons, all of whom would be heirs of the body of the entailer,—and that description of persons includes all who could be heirs of the body,—whom failing to his brother and divers other classes of persons who would not be heirs of his body. Some of the prohibitions are as follow: "It shall not be lawful for Sir Evan Macgregor or John Athol Macgregor, or any of the other heirs of taillie;" but in the irritant clause the terms used are: "in case the heirs descending of my body or any of the other heirs of taillie before mentioned shall contravene," and so on; and the resolute clause is: "the person or persons so contravening." The question is, whether the institute be included in the words "heirs descending of my body"? for that he cannot be included in the words "heirs of taillie" is quite clear upon the authorities.

Now, there were two classes of heirs of taillie under this entail; first, persons descending of the entailer's body,

and secondly, other persons not descendants of his body, and the obvious and natural construction of the sentence is, heirs of taillie, whether descendants of my body or of any other description; and if such be the construction it is not contended that the institute would be included in it. But the question is not whether the words may not include him, but whether they necessarily do include him. The clause provides for events which might take place when the parties under the deed of entail were in possession; but the son Sir Evan Macgregor never could be in possession as heir quoad this property. The deed itself destroyed the possibility of his being in possession as heir; and the entailer is speaking not of his heirs of line, but of persons to be entitled under the deed, many of whom would be heirs descending of his body under the deed, which the institute never could be. To include the institute in these words would therefore be a forced construction, and a stretching of the meaning of the words beyond their natural import; and as the rule is that the institute cannot be included by implication or by a construction of words capable of a different meaning, adopted from other parts of that deed, but only by an intent clearly and unequivocally expressed within the clause itself, it appears to me quite clear that this case is not within the rule. If the words "heirs before mentioned" had been used alone, there could be no doubt that the institute would not have been included; but the words in this deed would have had precisely the same meaning as the words "heirs descending of my body, or any other heirs of taillie before mentioned," for of such all the heirs taking under the entail consisted.

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My Lords, no case appears to have occurred in which the question turned upon the precise words to be found in this case; but as the rule is clear, there does not appear to me to be any difficulty in applying it to the words to be found here.

My Lords, we are not at liberty to look into other parts of the deed for the purpose of discovering the entailor's intention, and thereby of including the institute in words which do not properly include him, but if we were at liberty so to do we should find that he considered his son as an heir of tailie; but if that be so, the whole ground fails for construing the words "heirs" "descending of my body" otherwise than "heirs of" "tailie descending of my body"; and if so, all the cases from the Duntreath case prove that the institute cannot be fettered under such description, although the intention of the entailor to include him may be manifest from the other parts of the deed.

My Lords, I have no hesitation therefore in concurring in the opinion of the great majority of the judges of the Court below, and in moving your Lordships to affirm the interlocutor appealed from.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors therein complained of be and the same are hereby affirmed.

HAY and LAW—RICHARDSON and CONNELL, Solicitors.

[12th February 1838.]

JAMES HAMILTON, Appellant.—*Attorney General*
(*Campbell*)—*Stuart*.

JOHN WRIGHT and others, Trustees of the late
THOMAS WRIGHT, Respondents.—*Sir William Follett*
—*Dr. Lushington*.

Writ—Rei interventus—Cautioner.—1. A bond of annuity was granted by three parties, and the signature of one of them, A., was duly attested; while the signatures of the other two (B. and C.) were attested by two witnesses, but of whom one only was duly designed in the testing clause; thereafter, on the faith of the bond, the price of the annuity was paid to A., through the hands of B., as A.'s agent, or at least in B.'s presence, and with his knowledge: Held (affirming the judgment of the Court of Session), that B. was barred by *rei interventus* from objecting to the error in the testing clause; and that this was not affected by the circumstance that C. had died in the interim, and that the *rei interventus* did not extend to him.

By a bond dated 10th December 1817, the Hon. Thomas Bowes, John Buchan, writer to the signet, and James Hamilton, Esq., of Kames, in consideration of the sum of 2,000*l.* instantly advanced and paid to them by Mr. John Telford, bound and obliged themselves, conjunctly and severally, their heirs, executors, and successors

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whatsoever, to content and pay Mr. Telford, his heirs and assignees, by half-yearly payments, a free yearly annuity of 221*l.* 13*s.* 4*d.* during the life of the Hon. Thomas Bowes. The annuity was declared to be redeemable on repayment of the 2,000*l.*

The testing clause was in these terms :—"Subscribed by the said Thomas Bowes, at Edinburgh, &c. before these witnesses,—Alexander Anderson, printseller in Edinburgh, and George Nelson, tenant in the county of Bute, and by us the said John Buchan and James Hamilton, at Edinburgh, the said 10th day of December, a year aforesaid, before these witnesses,—George Simson junior, writer in Edinburgh, and the said Alexander Anderson." One of the two witnesses to the subscription of Mr. Buchan and Mr. Hamilton signed William Simson, while the testing clause took notice only of George Simson. It was not alleged that Mr. Hamilton derived any advantage from the annuity, which was expressly for the benefit of the Hon. Thomas Bowes, or that he acted in any other capacity than as agent for him. The price (2,000*l.*) was paid through the hands of the appellant, Mr. Hamilton, or at least in his presence, to Mr. Bowes.

The annuity never was redeemed, but continued to be paid for many years through the appellant to Mr. Telford.

In 1822 Mr. Telford assigned the bond of annuity to Mr. Thomas Wright of Glenly, who is now represented by the respondents.

In 1832 the bond was registered by the trustees of Mr. Wright, and a charge was given to the appellant for the arrears of the annuity at and since Martinmas 1822.

Previously to this charge being given, letters of horning had been raised against Mr. Bowes, who had become Earl of Strathmore, on the bond of annuity, who having disobeyed the charge was denounced; and Mr. John Buchan, the other co-obligant in the bond; had died in bankrupt circumstances, unrepresented by any heir or successor under a lucrative title.

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Mr. Hamilton presented a bill of suspension, alleging that the bond was a nullity as to him, on the ground that his signature was unattested, there being no such witness as the subscriber William Simpson mentioned in the testing clause; and he instituted an action for the reduction of the bond, which was conjoined with the suspension. The respondents also raised an ordinary action against Mr. Hamilton, concluding for payment of the arrears on the bond of annuity; and all these actions were conjoined.

The Lord Ordinary, on the 12th of May 1835, pronounced the following interlocutor: " Finds, that James
" Hamilton, pursuer of the reduction, is barred, rei
" interventu, from objecting to the error in the testing
" clause of the bond of annuity libelled on; repels the
" reasons of reduction; assoilzies the defenders from
" the conclusions of that action, and decerns; and in
" the ordinary action and suspension appoints counsel
" to be further heard.

" Note.—It is clear that the bond of annuity, in so
" far as Mr. Hamilton was an obligant, was originally
" improbativ, in consequence of the mistake as to the
" witness's names in the testing clause, and he would
" have been entitled to avail himself of that mistake,
" although he acknowledged his own subscription, if
" things had remained entire. But the price of the

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" annuity was paid to Lord Strathmore on the faith of
" Mr. Hamilton's engagement, and Mr. Hamilton was
" aware of that fact, as appears from his books as well
" as his admissions in the record. As agent for Lord
" Strathmore, he negotiated the transaction, and, if he
" did not receive the price into his own hands, was
" present when it was paid over to Lord Strathmore,
" or to others for his Lordship's behoof. Further, for
" a long period he was the person from whom the
" annuitant received the termly payments of the
" annuity. Being jointly bound with Lord Strath-
" more, it is of no consequence whether the money was
" applied to his use or to that of his co-obligant; for to
" constitute a rei interventus, it is not necessary that
" the party against whom it is pleaded should derive
" benefit from what has been done. It is enough if
" the party who pleads it is placed in circumstances on
" the faith of the agreement, by which his interest
" would suffer if it were not implemented. Neither is
" a rei interventus pleadable merely to supply a defect
" in written evidence; it also bars locus poenitentiae, in
" cases in which a party might otherwise competently
" resale. The distinction so much dwelt upon in
" Mr. Hamilton's case, between a contract for a loan
" and for the purchase of an annuity, does not appear
" to the Lord Ordinary to affect the question in any
" respect. Both contracts are legal, and when regu-
" larly entered into may be enforced, for it is settled
" that usury cannot be pleaded against a contract for
" an annuity, although the purchaser for his further
" security should insure the seller's life. It may
" further be remarked, that there can be no dispute
" here as to the terms of the bargain, because the bond

“ which Mr. Hamilton subscribed as a co-obligant is
 “ confessedly binding upon Lord Strathmore, the
 “ testing clause, as it applies to his Lordship’s sub-
 “ scription, being perfectly correct.”

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Against this interlocutor the appellant reclaimed to the First Division of the Court, and their Lordships pronounced the following interlocutor on the 22d January 1836; “ adhere to the interlocutor reclaimed against, “ refuse the desire of the reclaiming note, and remit “ the cause back to the Lord Ordinary, to proceed as “ shall be just; find the suspender, James Hamilton, “ liable in the expense of the proceedings since the “ date of the Lord Ordinary’s interlocutor, reserving “ all questions as to any other expenses in the cause “ for future discussion and determination; and remit “ the account of the expenses found due, when lodged, “ to the auditor of Court, to tax the same, and “ report.”¹

Against these interlocutors the appellant brought the present appeal.

Appellant.—The bond not being executed in terms of the act 1681, c. 5. must be considered null and void, and incapable of supporting the charge given by the respondent. That act imperatively declares, “ that “ only subscribing witnesses in writs to be subscribed “ by any party hereafter shall be probative, and not “ the witnesses insert not subscribing; and that all “ such writs to be subscribed hereafter, wherein the “ writer and witnesses are not designed, shall be null, “ and are not applicable by condescending upon the “ writer or the designation of the writer and witnesses;”

¹ 14 D., B., & M., 323.

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and the Court have strictly adhered to the statute.¹ In the case of a formal and solemn deed the want of the statutory solemnities cannot be supplied, even by the admission of the subscriber himself.²

Even supposing it were law that a formal deed, null under the statute 1681, may be kept alive and supported by homologation,—it is clear that that homologation must be of the most unequivocal kind, and that there must be a decided *rei interventus* by the act of the obligant which may operate as a bar to his getting free of his obligation by re-establishing the contract against him.³ But none such have been established against the appellant. Until it is proved that the appellant, by some act, confirmed and homologated the bond before or since he was aware of the nullity, the principle of *rei interventus* cannot be held applicable to this case.

Respondents.—The principle of *rei interventus* renders it incompetent to challenge the bond as informal, for the money was paid by the original creditor, and received by the appellant, and the other obligants, on the faith of that deed. It never was intended by the statute 1681, c. 5. to declare that when any solemnity was neglected, such writing was to be *ipso jure* null, in

¹ *Abercromby v. Innes*, 15th June 1707, Dalrymple 104, Fountainhall 2. 381, Forbes 179, Mor. 17022-3-4; *Douglas v. Clerk*, 28th Nov. 1787, Fac. Coll. 10, 11. No. 6. Mor, 16908; *Archibald v. Marshall*, 17th Nov. 1787, Mor. 16907.

² *Gordon v. M'Pherson*, 1686; *Harcass* 47. No. 207. Mor. 17021. *Logie v. Ferguson*, 4th Jan. 1710, Mor. 71620; *Shiel v. Crosbie*, 4th July 1739, Mor. 17032; *Park v. M'Kenzie*, 29th Nov. 1764, Mor. 8449; *Rolland v. Rolland*, 1st July 1767, Mor. 16837; *Macfarlane v. Grieve*, 22d March 1790, Mor. 8459.

³ *Erskine*, b. iii. *ed.* 3. sec. 48; *Freswick v. Sinclair of Duntreath*, 17th Feb. 1715, Mor. 5654; *Liddell v. Dick*, 20th July 1744; *Elchies Homol.* No. 1.

the same way as if no such deed had ever been granted; but only to afford an exception or ground of reduction which the party might voluntarily pass from, or which might be elided by homologation.¹

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LORD CHANCELLOR.—My Lords, it is not my intention to move your Lordships finally to dispose of this case to-day, because two or three cases have been cited in the course of the argument, and referred to on both sides, which I have not had an opportunity of examining in the original reports, and I am anxious to have an opportunity of doing so before your Lordships finally dispose of the case; but unless, my Lords, upon examining those cases, the opinion which I have now formed and entertained is materially altered, I have no doubt as to the course which I shall recommend to your Lordships to pursue; and therefore, unless I have my opinion on the inspection of these cases materially altered, I shall not again trouble your Lordships on the subject. I will therefore now state to your Lordships how this case strikes my mind.

My Lords, by an annuity bond three parties became

¹ *Authorities.*—*Freswick v. Sinclair*, 17th Feb. 1715 (5654); *Tailfor v. Hamilton*, 21st Jan. 1735 (5657); *Earl of Fife v. Sir James Duff*, 22d Dec. 1825, *Shaw*, vol. iv. p. 340; *Beattie v. Lambie*, 26th Dec. 1695 (17021); *Milliken v. Foggo*, 20th Dec. 1746 (16979); *Auchinleck*, 26th Nov. 1580 (12382); *Deuchar*, 19th Jan. 1672 (12387); *Bell*, 13th Nov. 1812 (F. C.); *Smith*, 25th Jan. 1821, 2 *Shaw's Appeal Cases*, 272; *Crawford*, 16th Jan. 1739 (9979); *Niel*, 28th June 1748 (10406 & 16981); *Brown*, 25th Nov. 1794 (17058); *Sinclair*, 3d Feb. 1795, *Bell's Cases*, (folio.) No. 59; *Brebner*, 18th Jan. 1803 (17060); *Henderson*, 5th Dec. 1765 (16986); *Dunmore Coal Co.*, 1st Feb. 1811 (Fac. Coll.); *Twesdie*, 6th June 1823 (2 S. & D., p. 361, new ed. 321); *Grant*, 8th Feb. 1827 (5 S. & D., p. 317); *M'Neil*, 21st Jan. 1825 (3 S. & D., p. 459, new ed. 319); *Laidlaw*, 31st May 1826 (4 S. & D., p. 636, new ed. 644); *Wilson*, 3d March 1830, (8 S., D., & B., p. 625.)

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bound for the payment of an annuity: Thomas Bowes; —who is stated to be the principal party, and who no doubt was the principal party for whose benefit the 2000*l.* was advanced, and therefore who was no doubt, as between himself and the other co-obligors, the principal party who ought to pay the annuity,—as between the grantee of the annuity and the party who advanced the 2000*l.*, those who have become bound to him were Thomas Bowes himself, John Buchan, and James Hamilton, the party who now disputes the liability upon that bond.

My Lords, it appears that in consequence of an informality in the attesting clause of that bond, under the provisions of the statute of 1681, it was not an instrument which, according to the provisions of that Act, would bind the obligant, James Hamilton.

My Lords, it appears that a great many years elapsed during which James Hamilton was not called upon on this bond; but probably the obligee, or those who stood in the place of the annuitant, not being able to obtain the payment of the annuity from other quarters, applied for and issued a process of horning against that James Hamilton, upon the supposition that the bond was formal, and that they had a right to issue that process according to the law of Scotland. Now, my Lords, the attestation of that bond not being under the provisions of the act of 1681, the parties were entitled to the benefit of that bond in another course of proceeding, but were not entitled to issue that process, and have the benefit of that process, and therefore that process has been suspended; and that process, so suspended, is one of the proceedings now in progress in the Court of Session.

My Lords, James Hamilton, being called upon to pay this bond, institutes a proceeding for the purpose of having that instrument reduced, that is to say, that he might be exonerated from any obligation which might be enforced against him by having signed his name to that document. The party claiming the benefit of the annuity here, and who stands in the place of the obligee, institutes another proceeding, by which he claims, independently of the question whether that bond was within the statute of 1681 or not, the benefit of the contract entered into by James Hamilton, in consequence of his having put his name to that instrument.

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These, my Lords, are the three proceedings before the Court of Session, and they are united into one proceeding by an interlocutory order of the Court of Session, which your Lordships have now to consider as an interlocutor upon those proceedings by which James Hamilton sought to be relieved from this bond.

The ground upon which that claim on the part of James Hamilton is resisted is, not that the bond is attested according to the provisions of the act of 1681, for it is quite clear it was not so, but that such transactions took place under that instrument as precluded Hamilton from availing himself of that objection.

My Lords, a rule exists in the law of Scotland, and in the law of England there is another rule which is very similar, that although a party may not have been originally bound by law by the transaction which took place, yet if he has so conducted himself as to homologate the bond he shall not be permitted to take advantage of that objection, for if he were the instrument, instead of protecting the party from fraud, would be made an instrument of fraud itself.

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In our Courts of Equity, notwithstanding the statute of frauds would protect a party from being bound, unless by his act in writing, yet the party may so conduct himself as to be deprived of that benefit of setting up the protection of the statute, because his conduct may be such as to constitute a fraud in him in so insisting upon the provisions of the statute of frauds. There may be a case in which the party may partially perform the contract, and by so doing may put his opponent into a disadvantageous situation, owing to the confidence with which he entered into it, and Courts of Equity in such a case will not permit him to place his opponent in such a situation by taking advantage of the provisions of the statute.

Similar in principle appears to be the rule established by the law of Scotland, namely, that though instruments are not regular, or according to the provisions of the act, yet the party may so conduct himself as to make it unjust to take advantage of the objection; in which case it is not permitted to him to set up the provisions of the act; this is by homologation, which is more strictly applicable to this case than *rei interventus*.

Then, my Lords, it has been contended at your Lordships bar, which is not a point raised on the papers or in the reasons assigned by the case, that in the case of an instrument which is void under the act of 1681 that rule cannot be applied; and it cannot be objected to in respect of an instrument sought to be reduced, that the party has homologated it, or that there is that state of *rei interventus* which in other cases would prevent him from raising the objection.

I have endeavoured to find authorities in support of this position, but instead of that I find conclusive

authorities, which have been quoted at the bar, which show the contrary. What is the rule according to the laws of Scotland? I find in 2d Erskine, page 619, it is there stated, "A question hath been mooted whether deeds intrinsically null can receive strength or validity by homologation; as to this the following distinction may perhaps be received." Then, my Lords, he goes on to state, the cases of persons naturally incapable as idiots, and so on, and then he proceeds, "for though it be declared by several statutes that deeds destitute of the written solemnities are null, that they cannot be supported by any condescendence, and that they shall bear no faith in judgment, these enactments are made merely in favour of the grantor, that he may the better be secured against the consequences of forgery, if they cannot be so interpreted as to deprive him of the power of supplying the defect himself, *quilibet enim jure per se introducto remanere potest*."

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"Where the act of homologation is itself invalid the defect of the original deed can thereby be supplied;" and then he goes on to discuss other matters.

My Lords, it is clearly laid down, and is not qualified by other cases which I have heard cited at your Lordships bar, that the effect of the statute making the instruments void must be subject to proofs of homologation, and a party may have placed himself in such a situation, as not to be permitted to take advantage of the provisions of the statute. That being so, my Lords, the only question is, whether that which has taken place in this case be that species of *rei interventus* which could prevent the party taking advantage of the provisions of the statute. Now, my Lords, in reference to the respondent's case, I find that rule not only laid

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12th Feb. 1838. down in the opinions delivered by the learned judges who decided that case, but accurately expressed in the words used by the Lord Ordinary. His Lordship says, "It is enough if the party who pleads it" (that is, *rei interventus*,) "is placed in circumstances on the faith of the agreement by which his interest would suffer if it were not implemented."

3) My Lords, this is very consistent with what is laid down in the case of *Moodey v. Moodey*, (in the Dictionary of Decisions, 419,) in which one of the grounds of decision is thus stated, "that the rule by which it is to be judged is, whether there is a *res integra* or whether there is a *rei interventus*, so as to exclude the locus *pœnitentiæ*." It has been laid down certainly that where any thing has happened on the faith of a verbal agreement, and the parties put themselves in the same situation wilfully, there is no locus *pœnitentiæ*; and cases are quoted in which the party relying upon a verbal promise not binding according to the law of Scotland has been nevertheless held to the performance of his promise, and not entitled therefore to set up the legal invalidity of the instrument.

Now, my Lords, what has taken place between the parties here? Not at all referring to a part of the case which appears to be a mistake, there is no evidence of the fact of Hamilton paying the annuity; but we have the important fact established,—for it is not disputed between the parties, though not strictly proved,—that he personally received the 2,000*l*. Of that fact, my Lords, there can be no doubt, for we have his own account set out in the appellant's case, in which he charges himself with receiving 2,000*l*. from Mr. Jamieson, who was the individual who was to pay it; and he goes on and

discharges himself by various payments for Mr. Bowes ; amongst others, by a payment to the same Mr. Jamieson of a charge for preparing the bond. My Lords, it is not at all material to consider whether there is evidence of Hamilton having received the money to his own use, —if he has received the money, having become the hand which actually received the money from the party now claiming the benefit of the obligation ; and I think your Lordships will not have much difficulty in coming to the conclusion that there is evidence that such was the fact.

My Lords, it is beyond all question that the money was paid. It appears that the money was paid to Mr. Hamilton. It appears that he put his name, that he became a co-obligor for the purpose of inducing the party who had the 2,000*l.* to advance it, and that the 2,000*l.* was advanced on the faith of that bond. The definition of that which is necessary to constitute *rei interventus* is not the benefit which the one party may have received, but the injury to which the other party may be exposed by his conduct if that contract is not held to be binding. It is stated that there is no evidence of his having paid the annuity ; that which constitutes the injury to the party is not the receiving back the purchase money, but the inducing the lender to part with the 2,000*l.* as a consideration for the annuity. That would, I apprehend, add very little to the strength of the case, except as evidence that he knew what was going on. It would not aggravate the injury suffered by the party who parted with the 2,000*l.* that he received part of it back again. Therefore, my Lords, this case comes within the definition, not only as it was laid down by the Court of Session in giving judgment in this particular case, but it comes also

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directly within the definition in the case of *Moodey v. Moodey*, and that which is to be found in page 608 of *Erskine*, where he says, that paying part of the purchase money is considered sufficient to prevent the party from setting up the ~~annuity~~ under the statute; that that is a sufficient *rei interventus*.

My Lords, in some of the cases which have been referred to at the bar it is so laid down. In *Sinclair v. Sinclair* the fact charged was payment of part of the purchase money, and it was held that payment of part of the purchase money was sufficient to defeat the omission of some of the statutory solemnities. My Lords, there is no authority the other way; there has been no case cited to show that payment of part of the purchase money is not sufficient to raise the question of *rei interventus* according to the law of Scotland. I was the more anxious to ascertain this, because I was aware that it has been a question of doubt in the law of this country, whether in these cases of part performance the paying of part of the purchase money was such a part performance as to take the contract out of the statute. I was anxious to find whether such a doubt existed in Scotland, and I find there does not; on the contrary, in all the cases that have been referred to it has been held that part payment of the purchase money is a sufficient part performance,—that which we in this country call a part performance, and which in Scotland they call *rei interventus*,—to preclude the party to the transaction from setting up the statutory infirmity of the contract, on the faith of which the purchase money was obtained.

Under these circumstances, my Lords, unless I find in looking into the other cases, which I have not yet had

an opportunity of examining, that my view of this case is very materially altered, I propose on Monday next to move your Lordships to affirm the order of the Court of Session.

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LORD CHANCELLOR.—My Lords, in this case I have taken an opportunity of referring to one or two of those cases which I had not before had an opportunity of examining. That examination has not only not altered the opinion I have expressed to your Lordships, but it has confirmed it in every point; and therefore I have no difficulty in advising your Lordships to affirm the interlocutor complained of; and as it is a question between debtor and creditor, and an appeal from the unanimous decision of the Court below, I should propose in this case to your Lordships to affirm the interlocutor with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That, unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DEANE & DUNLOP—RICHARDSON & CONNELL, Solicitors.

[13th March 1838.]

ARCHIBALD HILL RENNIE, Esq., Appellant.—*Sir William Follett—A. M'Neill.*

DONALD HORNE, Esq., Respondent.—*Burge—Maconochie.*

Entail—Sale.—Held (reversing the judgment of the Court of Session), that where there was a prohibition in an entail against sales, and in the irritant and resolute clauses there was a general declaration followed by a particular enumeration of the acts struck at, without specifying sales, the entail was not effectual to prevent a sale of the estate.

Question, Whether it be a fatal objection to an entail, that the prohibitory, irritant, and resolute clauses in an entail are not recited in the procuratory of resignation and precept of sasine, as well as in the body of the deed itself?

2d DIVISION.
Lord Jeffrey.

IN the year 1780, the Reverend Archibald Rennie, minister of the gospel at Muckhart, executed a deed of entail of the lands of Balliliesk, in favour of himself in liferent, and, after his decease, to “Archibald Hill, “only lawful son procreat betwixt Charles Hill, surgeon, at Manse of Muckhart, my nephew, and “Katharine Kelty, his spouse, in fee, and the heirs “whatsoever of his body;” whom failing, a series of substitutes. “With this condition always, that the said “Archibald Hill, and the other heirs aforesaid, succeeding to the lands and others foresaid in virtue “hereof, shall be holden and obliged to assume, use,

“ and bear the sirname of Rennie in all time here-
 “ after; and in case the succession of the said lands
 “ and estate shall at any time hereafter devolve upon
 “ heirs female, then and in that case the said heirs
 “ female, and the heirs descending of their bodies, shall
 “ be obliged to assume and constantly use and bear
 “ the sirname of Rennie; and if the heir female be
 “ unmarried at the time of her succession, she shall be
 “ obliged to marry a gentleman of the sirname of
 “ Rennie, at least one who shall assume and constantly
 “ use and bear the sirname of Rennie; and if married
 “ at the time to a husband of any other sirname, that
 “ immediately thereafter her said husband shall be
 “ holden and obliged to assume and constantly use and
 “ bear the sirname of Rennie aforesaid; and with this
 “ condition also, that the said Archibald Hill, and the
 “ other heirs of tailzie and provision aforesaid, shall
 “ likewise be obliged to possess and enjoy the lands
 “ and estate before mentioned, by virtue of this present
 “ settlement only, and by no other title whatsoever,
 “ and to insert verbatim the order and course of suc-
 “ cession, and hail conditions and declarations hereafter
 “ contained in the charters and infestments to follow
 “ hereupon, and in all the subsequent conveyances,
 “ charters, retours, and infestments of the foresaid lands
 “ and estate: And with this limitation and restriction,
 “ that it shall not be lawful to nor in the power of the
 “ said Archibald Hill, nor any others of the heirs of
 “ tailzie aforesaid, to alter, innovate, or infringe this
 “ present tailzie, and the order and course of succes-
 “ sion before mentioned, or to sell, alienate, or burden
 “ the lands and others above disposed, or any part
 “ thereof, or contract debts, or grant bond, or any

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“ other right or security whatsoever which may any-
 “ ways burden or affect the said lands and estate, or
 “ do any other fact or deed, civil or criminal, directly
 “ or indirectly, whereby the said estate, or any part
 “ thereof, may be adjudged, confiscated, forfeited, or
 “ any ways evicted, in prejudice of the succeeding heirs
 “ of tailzie; and with this limitation also, that it shall
 “ not be in the power of the said Archibald Hill, or
 “ the other heirs of tailzie aforesaid, to set tacks of
 “ the said estate, or any part thereof, for longer space
 “ than nineteen years, nor the park in which the prin-
 “ cipal house and office-houses stand, nor the park lying
 “ immediately on the west side thereof, neither the said
 “ principal house and offices, longer than the lifetime
 “ of the setter, without any diminution of the rental,
 “ except in the case of evident necessity, in which case
 “ the said tacks are to be set by public roup, after
 “ intimation thereof three several Sundays preceding
 “ the roup at the parish church where the lands lie;
 “ and in case the said Archibald Hill, or any of the
 “ heirs of tailzie before mentioned, shall contravene or
 “ fail in performing any part of the premises, particu-
 “ larly by neglecting to assume, use, and bear the
 “ surname of Rennie, or by possessing the foresaid
 “ estate in virtue of any other title than the present
 “ tailzie, or by omitting to engross in the whole rights,
 “ charters, retours, and infeftments, the order of suc-
 “ cession, and whole conditions, provisions, and declar-
 “ ations herein contained, or by altering the order and
 “ course of succession above set down, or if they or
 “ any of them shall contract debt, or do any deed
 “ whereby the said estate or any part thereof may be
 “ burdened, evicted, confiscated, or forfeited, or shall

“ set tacks otherways than as before directed, or shall
 “ contravene or fail in any part of the premises, then
 “ not only all such acts and deeds of contravention,
 “ and debts so to be contracted, shall be and are hereby
 “ declared void and null to all intents and purposes,
 “ in so far as the same may affect, burden, evict, or
 “ forfeit the said lands and estate, but also the con-
 “ travener, for himself or herself only, shall ipso facto
 “ amit, loose, and forfeit all right, title, and interest in
 “ or to the said lands and estate, and the same shall
 “ become void and extinct, and the said estate shall
 “ devolve, accresce, and belong to the next heir of tailzie
 “ appointed to succeed, although descended of the con-
 “ travener’s body, in the same manner as if the con-
 “ travener were naturally dead, and to establish his or
 “ her right in any legal way, free from all debts and
 “ deeds of the contravener; and with this condition
 “ also, that the said Archibald Hill, and the other heirs
 “ of tailzie aforesaid, shall timeously satisfy and pay
 “ the feu and other duties payable forth of the said
 “ estate, and all other real and public burdens affecting
 “ the same, and shall obtain themselves timeously
 “ entered, infest, and seised therein, and shall not suffer
 “ any legal diligence to pass against the said estate, for
 “ the feu or non-entry duties or any other duties or
 “ legal or public burdens affecting the same, or for any
 “ debts or obligations that may be owing by me or
 “ my predecessors, or any other person whatsoever;
 “ and in case he or she fail so to do, they shall forfeit
 “ and amit all right and title to the said estate, and
 “ the same shall devolve to the next heir of tailzie, as
 “ if the contravener was naturally dead; and with this
 “ condition and limitation also, that in case the said

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“ Archibald Hill, or any of the other heirs of tailzie
“ before mentioned, shall be convicted or attainted of
“ high treason, then and in that case they shall ipso
“ facto forfeit and amit all right and title to the said
“ estate, and the same shall immediately thereafter de-
“ volve upon and appertain and belong to the next
“ heir of tailzie capable to take and enjoy the said
“ estate, in the same manner as if the person so con-
“ victed or attainted had been naturally dead at or
“ before committing such treason.”

There then followed provisions as to a nearer heir coming into existence,—as to jointures to widows, &c., a power to revoke,—and a reservation of the granter's life-rent, after which there was a procuratory of resignation in these terms: “ I hereby make, constitute, and
“ appoint each of you, conjointly and severally, my
“ lawful procurators, with full power to them and each
“ of them for me, and in my name, to resign, surrender,
“ overgive, and deliver, like as I hereby resign, sur-
“ render, overgive, and deliver all and whole the lands
“ and others particularly before described, and here
“ holden as repeated brevitatis causâ, in the hands of
“ my immediate lawful superiors thereof, in favours
“ and for new infeftments of the same, to be made
“ and given to myself in life-rent, and to the said
“ Archibald Hill in fee, and the heirs whatsoever of his
“ said body;” whom failing, the other heirs enu-
merated in the dispositive clause, (whose names were repeated); “ but always with and under the conditions,
“ provisions, restrictions, declarations, and reservations
“ before-mentioned, acts, instruments, and documents,
“ one or more, needful in the premises, to ask and take,
“ and generally every other thing to do which I might

“ do myself, or which to the office of procuratory in
 “ such cases is known to belong; all which I promise
 “ to hold firm and stable.”

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The precept of sasine was in these terms: “ Attour,
 “ I hereby desire and require you
 “ and each of you, conjunctly and severally, my
 “ bailies in that part, specially constituted, that upon
 “ sight hereof ye pass to the ground of the foresaid
 “ lands, and there give and deliver heritable state and
 “ sasine, with actual, real, and corporal possession, of all
 “ and whole the lands and others particularly before
 “ described, and here holden as repeated brevitatis
 “ causa, to myself in life-rent, and to the said Archibald
 “ Hill and the other heirs of tailzie before mentioned
 “ in fee, to be holden in manner aforesaid, but always
 “ with and under the conditions, provisions, restric-
 “ tions, declarations, and reservations particularly be-
 “ fore described, by delivering to myself and the said
 “ Archibald Hill, or our attorneys, bearers hereof, of
 “ earth and stone of the ground of the said lands, and
 “ a handful of grass and corn for the said teinds, and
 “ all other symbols necessary; and this in no ways ye
 “ leave undone; the which to do I commit to you and
 “ each of you, conjunctly and severally, my full power,
 “ by this my precept of sasine, direct to you for that
 “ effect.”

Mr. Rennie, the entailer, died in 1786, without having taken infestment on this deed, but his eldest son, the institute, on succeeding took infestment, and the investiture was confirmed by the superiors, and the entail was recorded in the register of tailties on the 28th of July 1786. The institute having died, the appellant, his eldest son, entered with the superiors by precept of

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clare constat, and took infeftment. Thereafter, on the footing that the entail was not effectual to prevent a sale, he offered the lands for sale, and they were purchased by the respondent at the price of 9,500*l*. The respondent being threatened with a charge for payment of the price, and conceiving that the entail prohibited sales, presented a bill of suspension, which was passed.

Thereafter, the appellant raised an action of declarator against the heirs of entail, setting forth the terms of the entail, “and that the said irritant and resolute clauses contain a specific enumeration of the acts and deeds of the heirs of entail, to which they are declared to apply; that they are not declared to apply to sales or alienations of the said lands, teinds, and others, or to any part thereof, by the heirs of entail succeeding to the said lands, teinds, and others; and it is therefore lawful to and in the power of the pursuer to sell the said lands, teinds, and others, and to alienate the same, for onerous considerations, and to do otherwise as after mentioned.” He therefore concluded that “it ought and should be found and declared by decree of the Lords of our Council and Session, that the pursuer is not restrained by the said disposition and deed of tailzie from selling or alienating the said lands, teinds, and others contained therein, and above described, and granting and executing all deeds necessary for effectuating the same, and that he has therefore right and power to sell the said lands, teinds, and others, or any part thereof, or to alienate the same, in whole or in part, for onerous considerations, and to grant all deeds, dispositions, and other writings whatsoever necessary for effectually conveying the whole or any part or parts

“ of the said lands, teinda, and others, which he may so
 “ sell or alienate; and further, it ought and should
 “ be found and declared, by decree foresaid, that upon
 “ the lands and others above described being so sold
 “ and alienated they shall no longer be affected or
 “ liable to the other conditions and provisions contained
 “ in the said deed of entail, which shall no longer bind
 “ or affect the said lands and others.”

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The heirs of entail gave in defences, maintaining that the entail was so constructed as effectually to exclude the power of sale, and that the appellant having completed titles upon this entail, in which the whole conditions and provisions of the deed are incorporated, could not validly dispoise the estate to the prejudice of the substitute heirs of entail.

Lord Jeffrey, on the 23d Feb. 1836, pronounced this interlocutor: “ The Lord Ordinary having resumed consideration of the debate, with the closed record and whole process, in respect that the prohibition against selling, contained in the entail under which the lands of Balliliesk are held by the charger, is not properly fenced or secured by the irritant and resolute clauses thereof, Finds that the minute of sale of the said lands, entered into between the said charger and the suspender, was a lawful transaction, and such as may and ought to be enforced at the instance of either of the parties; and, therefore, repels the reasons of suspension, finds the letters and charge orderly proceeded, and decerns; but finds no expenses due.

“ *Note.*—There is a shade of distinction between this case and that of Tillicoultry, 15th Jan. 1799

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“ (Mor. 15,539), inasmuch as the defective enumera-
 “ tion in the resolute clause begins in that case with
 “ the words, ‘either by not assuming the name and
 “ ‘arms,’ &c.; and in this case with the words, ‘par-
 “ ‘ticularly by neglecting to assume the name,’ &c.
 “ But they coincide in that cardinal defect on which
 “ the Lord Ordinary has always understood the case
 “ of Tillicoultry to have proceeded, and the law to
 “ have been settled ever since the affirmance of the
 “ judgment in the House of Lords, viz., the total
 “ omission of any express reference to the prohibition
 “ against selling, in an irritant and resolute clause,
 “ framed on the principle of distinctly reciting and
 “ enumerating the several prohibitions, and not on
 “ that of a general reference to them, as detailed in a
 “ preceding part of the deed.

“ The case of Porterfield (14th January 1812, Fac.
 “ Coll.) is less precisely in point, though in two respects
 “ it is even stronger than the present; 1st, because the
 “ defective enumeration occurs there in a second or sup-
 “ plementary joint irritant and resolute clause, following
 “ immediately upon certain special provisions, (including
 “ that as to leases, as to which was there no question,)
 “ and evidently intended mainly to secure their efficacy;
 “ and, 2d, because the enumeration itself is not, so far
 “ as it goes, in the full or precise terms of the original
 “ prohibitions (as is the case here), but is to a certain
 “ extent in the nature of a general reference, though
 “ containing the names of several of the acts that had
 “ been prohibited; leases, however, not being of the
 “ number. The authority of the case of Tillicoultry was
 “ held, however, very clearly to extend to such a case.”

Against this interlocutor the respondent Horne presented a reclaiming note to the Second Division, and the action of declarator having come into Court, the Lord Ordinary made great avizandum with it; and thereupon the Court conjoined the actions, and appointed the question to be argued on Cases. On advising them, their Lordships, on 17th January 1837, pronounced this interlocutor: "The Lords, having heard counsel, and advised the cause, alter the interlocutor of the Lord Ordinary submitted to review; sustain the reasons of suspension, and decern; but find no expenses due to either party."¹

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Rennie appealed.

Appellant.—Entails are subject to the most rigorous construction. Restrictions are not to be extended by analogy, whether as regards the person or the matter prohibited. Nothing is to be conceded to presumption, however strong, or implication, however clear. General words are to receive effect in their narrowest, not in their largest meaning. The law will not, as in the interpretation of other and more favoured instruments, lend itself, by straining construction, to aid the views of a granter of a deed. On the contrary, to make the intention of an entailer effectual, he must express himself in words so clear and explicit, so unequivocal in their meaning and import, as to leave no choice, and force the reception of that which is odious to the law, as being contrary to the natural rights and reasonable enjoyment of property, and adverse to the best interests

¹ 15 D., B., & M., p. 376.

RENNIE of society. This is illustrated by many decisions. In
U.
HORNE. the case of *Erschine v. Balfour Hay*, 14th February
 13th Mar. 1838. 1758, the fetters were laid upon heirs of tailzie and
 provision, and it was obvious that the granter of the
 deed did not intend to put the institute in any favoured
 situation, or to leave him an unlimited proprietor,
 while he imposed fetters on the substitutes. In im-
 posing the fetters, however, he used the words "heirs
 " of entail," and that expression was held not to in-
 clude the institute, because, in strict legal sense, the
 heir was not an institute, but a disponee. So in the
 case of *Duntreath*, (*Edmonstone v. Edmonstone*,
 24th November 1796,) no one could reasonably doubt
 the entailer's intention. In more than one clause of
 the deed he used the strong expression "Archibald
 " Edmonstone and the other heirs of tailzie," which
 gave as strong an implication as words could furnish,
 that the entailer looked upon the institute as an heir,
 designating the whole members of the entail by the
 terms, "Archibald Edmonstone, and the other heirs
 " of tailzie;" but the restraining clauses did not
 apply directly to the institute. Their Lordships of
 the Court of Session held, that "in respect it ap-
 " peared, from several clauses in the entail executed
 " by the pursuer's father, that the pursuer is compre-
 " hended under the description and designation of heir
 " of entail, he is thereby subjected to the limitations
 " and restrictions of the said entail." But this House,
 on the 16th April 1770, overruled this erroneous prin-
 ciple, and expressly declared, "that the appellant,
 " being fiar or disponee, and not an heir of tailzie,
 " ought not, by implication from other parts of the
 " entail, to be construed within the prohibitory, irri-

“ tant, and resolute clauses, laid only upon heirs of
 “ tailzie.” Upon the principle so established, the subsequent cases of *Gordon v. Lindsay*, 8th July 1777; *Menzies v. Menzies*, 25th June 1785; *Wellwood v. Wellwood*, 23d February 1791; *Miller v. Cathcart*, 12th February 1799; and *Steele v. Steele*, 12th May 1814, and affirmed 24th June 1817, were all decided: and Lord Eldon, in giving judgment in that latter case, observed, “ After it has been so often decided that
 “ the institute or disponent cannot be fettered by im-
 “ plication, that principle having been once solemnly
 “ settled, it ought not now to be got rid of by nice
 “ thin and shadowy distinctions.”

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All these cases establish the general principle, that unless the technical and legal form of expression be applied, no attention can be paid to the intention of the entailor, however apparent it may be. An entailor may, no doubt, make the irritant and resolute clauses applicable to all the acts prohibited in the restrictive clause, by a general declaration, that if the heir of entail in possession shall contravene any of the prohibitions, he shall forfeit the estate, and that the act so done shall be ipso facto void and null; or he may enumerate the various acts prohibited, and apply the irritant and resolute clauses to each of the acts so prohibited; or he may adopt a third form of applying one of the irritant and resolute clauses generally to the acts prohibited, and applying the other to each of them individually. But in either of these last cases, if the entailor should omit one of the prohibitions in the enumeration of the specific acts, the effect of the doctrine of strict interpretation is undoubted, that the pro-

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hibition omitted is not one binding upon the heir in possession. Thus, if there is a prohibition to alter the succession, to sell, or to contract debt, but the irritant and resolute clauses proceed upon the principle of reciting the different prohibitions, and, while they declare that any deed altering the succession, or any debt contracted, shall be null and void, and infer a forfeiture of the contravener's rights, omit words specifically applicable to sale, the entail will be defective so far as the sale of the lands is concerned, even although it is plain that the intention of the entailer was to prevent the alienation of his estate by sale or otherwise.

The first case decided upon this point was that of Tillicoultry.¹ By the deed of entail in that case the heirs were prohibited from selling, disposing, or dilapidating the estate, and from contracting debt, or doing any act or deed, civil or criminal, by which the estate might be adjudged, evicted, or forfeited. Then there was a general irritant clause, in the following terms: "All which deeds are not only declared void and null, ipso facto, by way of exception or reply, without declarator, or in so far as the same may burden and affect the foresaid estate." The resolute clause was in these terms: "But also it is hereby provided and declared, that the said James Bruce, and the other heirs of tailzie, who shall contravene and incur the said clauses irritant, or any of them, either by not assuming the name and arms of Bruce of Kinross, or by the said heirs female, they being unmarried, and not marrying a gentleman of

¹ Bruce v. Bruce, 15 Jan. 1799, 15539.

“ the said name, or who shall assume, bear, and carry
 “ the said name and arms, or, being married, they
 “ and their heirs of the said marriages not bearing
 “ and carrying the said name and arms as aforesaid,
 “ or by the said heirs their not accepting the benefit
 “ of this present tailzie within year and day after the
 “ death of the immediate preceding heir to whom they
 “ may succeed in manner respective foresaid, or who
 “ shall break or innovate the said tailzie, or contract
 “ debts, or commit any other fact or deed, whereby
 “ the said lands and estate may be anywise evicted or
 “ affected in manner foresaid, or who shall suffer or
 “ permit the said lands or estate, or any part thereof,
 “ to be evicted, adjudged, or apprised, or anyways for
 “ any debts or deeds contracted or done by them
 “ before their succession, or by any of their prede-
 “ cessors whom they shall represent, and wherein they
 “ shall be made liable, or anyways representing them;
 “ that then and in any of the said cases, the person or
 “ persons so contravening as said is, shall forfeit,
 “ amit, and tyne their right of succession of the afore-
 “ said lands and estate, and all infeftments or pre-
 “ tended rights thereof in their persons shall from
 “ thenceforth become extinct, void, and null, ipso facto,
 “ by way of exception or reply, without declarator, as
 “ said is, and the same shall devolve, fall, and belong
 “ to the next and immediate heir of tailzie in being
 “ for the time, who is ordained to succeed to the fore-
 “ said lands and estate, by virtue of the tailzie and
 “ substitution foresaid.”

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If the resolute clause had stopped with the general
 reference to all the acts prohibited, and to which the

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previous irritant clause, had applied, it would have been quite sufficient; but it proceeded to enumerate the various acts, and the word "selling" was omitted. This raised the question, whether the general terms used in the first section of the clause could be controlled by the enumeration of the particulars, and whether the omission of the word "selling" was sufficient to have rendered the deed of entail inoperative against a sale by the heir, and the Court held that it had that effect, and consequently that a sale by the heir was effectual, and this decision was affirmed by this House on appeal.

This was confirmed by the decision in the cases of Bonnington¹; of Monzie, where the resolute clause

¹ Scott Moncrieff v. Cunningham. This case is not reported, but the following statement of it was given by the appellant.

By the entail of Bonnington, the heir was obliged to assume the name and arms of Cunningham; and this was fortified by a separate irritant and resolute clause, applicable solely to that condition or prohibition.

Then follows the general prohibitory clause, in these terms: "That it shall be noways leisome nor lawful to the said Alexander Cunningham my son, nor the heirs of his body, and failzeing thereof, to my said daughters, nor the heirs of their bodies, nor to any other of the subsequent heirs of tailzie and provision succeeding in the aforesaid lands and estate, by virtue of the aforesaid taillie and substitution, or any of them, to sell, analzie, dispoone, dilapidate, or put away, the foresaid lands or estate, or any part or portion thereof, nor to innovate or infringe this present tailzie and order of succession hereby made by me, nor to contract debts, nor to do any other fact or deed, civil or criminal, of omission or commission, whereby the said lands and estate may be anyways apprised, adjudged, evicted, or forfeaulted frae them, or any otherwise affected, in prejudice or defraud of the subsequent heirs of tailzie and provision foresaid successive, according to the order and substitution above mentioned."

The irritant clause was quite general, and applied to every act of contravention whatever. It was as follows: "Whilkis hail debts or deeds sua to be contracted or done, or omitted be them, in prejudice or defraud, as said is, are not only thereby declared void and null, ipso facto, be way of exception or reply, without any necessity of decla-

enumerated particulars, but left out the words of alienation; *Breadalbane v. Campbell*, 1812, not reported; of *Prestonfield*¹; and of *Morehead v. Morehead*.²

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2. But, independently of the above objection, the entail is ineffectual, in respect the irritant and resolutive clauses are not included nor referred to in the procuratory of resignation or precept of sasine contained in the deed of entail.

The statute declares, that "such tailzies shall only

"rator to follow thereupon, in sua far as the samen may burden and
"affect the said estate."

The resolutive clause, however, was formed in a different manner, omitting altogether the prohibition against selling. It was as follows:—"But it is also hereby provided and declared, that the said heirs of tailzie, who shall contravene and incur the said clauses irritant, or any of them, either by not bearing, assuming, using, and carrying the said name and arms of Cunningham, or by the said heirs female, their not marrying a gentleman of the name, or who shall assume the name and bear and carry the said surname and arms in manner respective foresaid, or who shall break or innovate said tailzie, or contract debt, or commit any other fact or deed of omission or commission, whereby the said lands and estate may be evicted, or anyways affected, in manner foresaid, that then and in any of the said cases the said person or persons sua contravening shall forfeit, amit, and tyne their right and succession of the foresaid lands and estate; and all infestments and pretended rights thereof in their persons shall from thenceforth become extinct, void, and null, ipso facto, by way of exception or reply, without declarator, as said is; and it shall be lawful to the next and immediate heir of tailzie in being for the time, who is appointed to succeed to the foresaid lands and estate by virtue of the tailzie and substitution foresaid, either to be served heir in special therein to those who died last infest before the contravener, and thereupon to be retoured and infest, or otherwise to pursue for declarators, adjudications, or other legal sentences," &c.

The proprietor of the estate of Bonnington, conceiving that he was entitled to sell the estate, entered into a minute of sale for that purpose, and the Court decided that the entail was not effectual, and sustained the sale. The House of Lords affirmed the judgment.

¹ *Dick v. Drysdale*, 14th Jan. 1812, Fac. Coll.

² *Morehead v. Morehead*, 31st March 1835, Shaw and M'Lean's Rep. vol. i. p. 29.

RENNIE “ be allowed in which the foresaid irritant and resolu-
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 HORNE. “ tive clauses are insert in the procuratories of
 13th Mar. 1838. “ resignation, precepts, and instruments of sasine.”
 And Mr. Erskine states¹, as one of the requisites of an
 effectual deed of entail, that “ the irritant clauses be
 “ inserted in the procuratories of resignation, and
 “ precepts and instruments of sasine, which proceed on
 “ the entail.”

It is absolutely necessary, therefore, for the efficiency of the entail, that the irritant and resolute clauses be inserted in the procuratory of resignation and the precept of sasine. This is requisite in point of feudal principle, because if these clauses are not contained in the procuratory of resignation, there is no authority for the superior, upon granting his charter of resignation, to insert these clauses in it; and, on the other hand, if they are not contained in the precept of sasine, and infestment is taken upon the disposition, there is no authority for their insertion in the instrument of sasine. The words of the statute, however, are express upon the subject, and therefore they must be inserted in the procuratory and precept, whether they would be required according to principle or not.

Accordingly, in practice, the irritant and resolute clauses are either inserted verbatim, or they are specifically referred to in the procuratory and precept. Where the deed of entail is in the form of a procuratory of resignation, the irritant and resolute clauses are of course recited at length; but where the procuratory of resignation is contained in a disposition

¹ Erskine, b. ii. tit. 8. sec. 26.

and deed of entail, and these clauses are inserted ad longum in the prior or subsequent part of the deed, still the procuratory of resignation and precept must distinctly and unequivocally refer to them.¹

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It is said that the general words used in the procuratory of resignation are to be considered as including irritant and resolute clauses. The words are, "that the lands are to be resigned with and under the conditions, provisions, restrictions, declarations, and reservations before mentioned." But the words "conditions and provisions" cannot be held as synonymous with, or as including, irritant and resolute clauses. The words of the statute are decisive upon this point. It declares, "that it shall be lawful to his Majesty's subjects to tailzie their lands and estates, and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit." Having thus given the power to entail, with "conditions and provisions," it proceeds, "and to affect the said tailzies with irritant and resolute clauses, whereby," &c.; thus drawing a marked distinction between these clauses and "conditions and provisions."

Then the words, "restrictions, declarations, and reservations," follow, and complete the enumeration of what is contained in the procuratory of resignation.

The word "restrictions" is another term for prohibitions, and cannot include either an irritancy or a forfeiture. The word "declarations" is equally powerless, and its meaning is shown by the deed of entail to

¹ Juridical Styles, i. p. 227; *ibid.* 238.

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be inapplicable to the irritant and resolute clauses, and the last word, "reservations," has reference merely to the power to revoke.

The precept of sasine does not even refer to the conditions of the entail, and no words are employed which can be held applicable to them.

Respondents.—It is fixed, by a multitude of decisions, that there is no requirement of the act 1685, or of the common law, by which it is necessary, in order to the completion of an effectual entail, that the irritant and resolute clauses should contain a specific enumeration of the acts which are declared null, and by the doing of which the heir's right is to be forfeited. A general reference to the previous prohibitory clause is all that is essential; and if the entail contain a declaration that acts done in contravention of the prohibitions in the former clause, or acts done in contravention of the premises, shall be null, and that the doing of them shall cause a forfeiture of the right of the heir in possession, or any similar or equivalent expression, then the entail will be perfectly valid.

But the ground of objection is, that the clauses contain an enumeration of acts which are declared null, and which are to be followed by the forfeiture of the heir. It is thence inferred that the entailer meant to enumerate all the acts which are to be attended by those results; and that as sale is not specified, it is to be held as not meant to be specified.

The clauses, however, do not profess to enumerate every individual case in which the irritancy and forfeiture shall apply; and the decisions referred

to do not establish any principle under which the present case would fall to be decided against the respondents.

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The general reference to the antecedent clause, though accompanied by an anxious enumeration of most of the prohibitions, is so framed as to be altogether independent of the subsequent specification. The expressions used, not only do not abridge or limit the operation of the general reference, but necessarily imply the existence of prohibitions not specified. It is provided that a party shall incur forfeiture by contravening prohibitions generally, and particularly by certain specific acts of contravention. From the very nature and conception of the sentence, therefore, the non-enumerated, as well as the enumerated prohibitions are treated of as being effectual. The entailor says, that the heir of entail who shall contravene or fail in performing any part of the premises, particularly by neglecting to assume the name of Rennie, or by possessing in virtue of another title, &c., shall forfeit. It is quite conceivable that he may have felt more anxiety about one or two acts of contravention, than about others. He may have apprehended more danger to the endurance of the entail from one quarter than from another; though, therefore, sufficiently providing against all, he may very well have selected for especial and particular mention, some of those acts which he least liked, or thought most probable. Any construction which would lead to the result that the mere expression of a special anxiety as to some, should be held as a total abandonment of the other, would not be justified by any received canon of construction.

It is a general maxim of construction, applicable as

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well to deeds of entail as to other deeds, that words and expressions used in such deeds, capable of bearing a meaning, shall have a meaning attached to them, and shall not be discarded or left without any signification being attached to them at all. Now, the general clause subjoined to the particular enumeration would, if the appellant's interpretation were correct, be absolutely devoid of meaning. If there were no other particular acts within the operation of the clause of forfeiture, except those already specified, it was of no use to subjoin "or shall contravene, or fail in any part of the "premises," all the particular modes of contravention. These words could only be intended to include acts not specified in the preceding part of that clause, and if the expression is to have any meaning attached to it at all, it must relate to sales.

It is argued, that the effect of the expression "particularly" is to be limited to the first particular act specified, and is not to be considered as affecting any of the acts subsequently enumerated, and that the word "or" is disjunctive. But the idea of restricting the use of the word "particularly" to the first of the prohibitions, seems to be irreconcilable with the plain reading of the clause, and the word "or," instead of disjoining the subsequently enumerated cases, plainly conjoins those various cases coming under the particular views of the entailer.

Then it is said, that unless a distinction was meant to be applied by the entailer to the specified and non-specified acts, the enumeration of particulars must be held to be futile, and so, in order to make the enumeration of the least use or value, it is necessary to hold that the enumerated cases come within stricter fetters

than the omitted case. It is no doubt true, that the enumeration of those cases does not add to the strictness of the fetters applicable to them; and it may be admitted that, in point of legal efficacy, the fetters attached as completely without as with the specification to those particular cases. It may be very superfluous in an entail to make assurance doubly sure in regard to particulars, as to which he felt special apprehension or anxiety; but if he has fairly and fully given expression to the declaration of irritancy and forfeiture, as applicable to the prohibitions contained in the former part of the deed generally, the effect cannot be lost by his additional precaution or guardedness.

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Neither is the appellant's argument supported by the decisions. The leading case on which he rests is that of *Tillicoultry*. In that case the irritant clause was sufficient, but the resolute clause was held not to apply, and did not apply to sales. It professed to contain a full enumeration of the special contraventions which should lead to a forfeiture of the contravener. It described the modes by which the forfeiture was to operate, which was in either of a certain number of ways. By its conception, it was only to those particular specified contraventions that the forfeiture of the contravener's right attached. It was to the heirs who should contravene the clauses irritant, or any of them, in certain special ways, that the penalty attached; and not a word was said of contraventions by any other mode. It was heirs who should contravene, either by not assuming the name and arms, or who should break or innovate the tailzie, or should contract debts, &c., who should forfeit the right to the estate. It was "then, and in any of the said cases," that is, in any of

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 " of the premises," that the person or persons con-
 travening should forfeit their right and title to the suc-
 cession of the estate. So that the forfeiture was made
 to depend, by the express form and texture of the
 clause, on failure or contravention with respect to cer-
 tain specific acts, and with respect to those acts alone;
 and it became impossible to extend the clause to any
 act not specified, without doing violence to the plainest
 rules of construction.

The case of Bonnington is not distinguishable from
 the case of Tillicoultry. In that case, as in the other,
 the general reference is detracted from and limited by
 a description of those various modes by which the for-
 feiture of the heir in possession was to be operated. It
 is just as in the case of Tillicoultry, either by one or
 other of several enumerated modes; and it is only
 "then, and in any of the said cases," that the person
 contravening is to forfeit his right.

The case of Prestonfield is equally inapplicable.
 The heir in possession had granted a lease exceeding
 the endurance specified in the deed of entail, and the
 question was raised as to his power under the deed to
 grant such lease; and this resolved into another, as to
 whether the irritant clause struck against the letting
 of tacks.

This clause was applicable only to dispositions,
 alienations, securities, debts, deeds, and facts, civil
 or criminal, contrary to the provisions of the deed.
 There was no irritancy applicable to leases by name;
 and it was admitted, that unless the word "deed"
 should be held to include leases, there was no irritancy
 which could affect them. The question, therefore,

turned upon the construction of the word "deed," and the meaning to be attached to it in that particular instrument; and the application of it to leases seemed to be excluded by the use of the word in the preceding clause, where it was subjoined to a prohibitory clause containing nothing about leases whatever. Accordingly the case appears to have been decided upon that ground.

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2. The second objection is founded upon the clause of the statute 1685, by which it is declared, "that such tailzies only shall be allowed in which the foressaid irritant and resolute clauses are insert in the procuratories of resignation, charters, precepts, and instruments of sasine." The appellant does not maintain that a verbatim insertion of these clauses in both procuratory and precept, or in either, is necessary. His argument rests upon the allegation that the "irritant and resolute clauses are neither included nor referred to in the procuratory of resignation or precept of sasine." The style to which he himself refers only contains, in the procuratory of resignation and precept of sasine, a general reference to the clauses. It is as follows: "But with and under the conditions, provisions, restrictions, limitations, clauses irritant and resolute, declaratory," &c. It may be, therefore, assumed to be a sufficient compliance with the statute, that there shall be a general reference in the procuratory or precept to these clauses, where they have been inserted at length in the prior part of the same deed. The object of the provision of the act is to certiorate the public of the existence of fetters as to the disposal or use of property. They must be set forth in the deed of entail, otherwise the register of tailzies would furnish no information as to the nature of the restrictions; they must appear in all renewals of

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the investiture, in order that the public records may not be **deceptive**. Now, it is impossible that the register of tailzies can fail to give information in the present case; because the whole provisions and conditions on which the estate is to be held are fully set forth in the deed of disposition and tailzie. It is, in like manner, impossible that the record should fail to exhibit the restrictions, because an omission to engross in the various deeds of succession the whole conditions, provisions, &c. is a condition duly fenced. So it is impossible to maintain, in consistency with a fair interpretation of the procuratory and precept, that they do not refer to the clauses irritant and resolute, for the procuratory of resignation gives power to "surrender," &c., "but always with and under the conditions, provisions, restrictions, declarations, and reservations before mentioned."

The precept of sasine is precisely the same, and is, therefore, qualified by the same reference.ⁱ

LORD CHANCELLOR.—My Lords, I feel no doubt with respect to this case, if the rule be, that where a party undertakes to enumerate in the irritant and resolute clauses those acts which are to infer forfeiture, the prohibition is imperative as regards any act which is not enumerated. The simple question is, whether he has made that undertaking here, and has enumerated the act of selling?

Now, in the Tillicoultry case the party did profess to enumerate: the clause was in these words, "It is hereby provided and declared that the said James Bruce, and the other heirs of tailzie, who shall contravene and incur the said clauses irritant, or any

ⁱ The House declined to hear the appellant's counsel in reply.

“ of them, either by not assuming—” then it goes on and enumerates all the acts prohibited but one. It was held that having omitted that one, although there were general terms, yet as he had undertaken to enumerate the particulars, and had failed to enumerate the one in question, that that made the clause inoperative, so far as that act was concerned.

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Now, my Lords, that case having been so decided and affirmed in this House, the sole question is, Whether that case does not bear upon the principle of the present case? And it comes to this question: whether there has been an attempt to enumerate the particular acts prohibited? Now the prohibition is, that it shall not be lawful, and “ in case the said “ Archibald Hill or any of the heirs of tailzie before “ mentioned shall contravene, or fail in performing any “ part of the premises, particularly by neglecting;—” (then it goes over four of the acts prohibited, and there that sentence stops;) “ or if they or any of them “ shall contract debt or do any deed,—” and so it goes on to the end, but omits the act of selling. How is it possible, according to the common use of language, to say that there has not been in this clause an attempt to enumerate? If there be an attempt to enumerate, and this particular act is omitted, then it is clear, under the authority of the Tillicoultry case, that this act so omitted is not prohibited. Therefore it appears to me that, taking the principle as established in the Tillicoultry case, and applying it to the particular language of this clause, there is no doubt that it falls within the principle of that authority.

LORD BROUGHAM.—My Lords, I entirely concur in what has fallen from my noble and learned friend.

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13th Mar. 1838. I consider this case entirely free from all doubt; had it been otherwise, I should have been of opinion that we ought to have heard the reply, and to have taken time to consider it, as we have the misfortune of differing from the Court below. I think this most clear, that, as I stated in the Herbertshire case, if that decision of the Court below were to stand, then the Duntreath case was no longer law; then the Findrassie case was no longer law; then the Randlestone case was no longer law: I might add, also, the Baldastard case (*Steele v. Steele*). So must I say here, that if this decision shall stand, the Tilli-coultry case,—one of the best considered cases, and most contested at the time, in the Scotch law of real property, that is to be found in the books,—is no longer the law of real property in Scotland. It is our bounden duty, therefore, to protect the law of real property in Scotland, established by the concurrent authority of text writers, the decisions of courts, and the uniform reference to it, of practitioners as well as of judges, in their opinions upon subsequent cases, against the great innovation whereby this decision, if suffered to stand, would sweep away that case, with all that has followed thereupon, and all the other cases which have been governed and ruled by the authority, till now undisputed, of that case.

My Lords, the Court below have been divided upon this subject, which certainly comforts one in coming to an opinion in favour of the small minority. It was by the narrowest possible majority of the five Judges, who applied their minds to the case that this erroneous decision was pronounced. My Lord Jeffrey and the Lord Justice Clerk took the same view of it that I do; my Lord Meadowbank and my Lord

Medwyn took the opposite view. Then the balance was cast by Lord Glenlee, a most venerable Judge,—a Judge who has been longer upon the bench than almost any other Judge in that or any other country,—I believe nearly forty years;—a most learned person, and well versed in the law of real property, as well as all the other branches of the law; it is, therefore, with great distrust that I should, in any ordinary case, have differed from Lord Glenlee. But when I come to consider that Lord Glenlee has all along held a peculiar doctrine upon the construction of deeds of entail, and that he appears, by the valuable note of my learned and most respectable kinsman Lord Meadowbank, produced by Mr. Maconochie at the bar to-day, to have been upon the wrong side of the question in the Tillicoultry case; that he has, subsequently, at different times thrown out opinions wholly inconsistent with the Duntreath case; that his Lordship, in the last case that came before us upon this branch of the law, namely, *Macgregor v. Macgregor*, was found to have laid down doctrines so entirely at variance with the principles now allowed to govern that branch of the law which relates to the construction of deeds of entail in Scotland, that the very counsel who supported the decision given by the minority, and who, therefore, would fain have relied upon Lord Glenlee's very respectable authority in his favour, was forced to give it up, and say that he could not push it so far as Lord Glenlee had pressed it in that case;—I really must say that, in this one instance, perhaps the only one in the whole range of Scottish jurisprudence, I reckon Lord Glenlee's authority a much lower authority, and as interposing a much less insuperable obstacle

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to arriving at a judgment of reversal, than I would in any other case in which it could have been cited. Being of opinion, therefore, that the two cases,—the Tillicoultry case and this decision, cannot stand together, I have to ask how the Judges in the Court below have endeavoured to reconcile them; and it is by the difference of the expression in the one case, and in the other the deed of entail. The Tillicoultry case, proceeds, first, upon a general denunciation of resolutions applicable to all the irritant clauses, which it is admitted were perfectly applicable to all the prohibitions, which, also, it is admitted were perfect; but following out, as it were, that general application, it enumerated the particular prohibitions and irritances in these words: “either by” so and so, “or by” so and so, enumerating the five, and omitting the sixth.

Now, there is this difference in the present case, that there is no general irritancy in this case, but there is a conjunct resolution and irritancy all in one clause to be denounced; and then, instead of saying “either by” so and so, “or by” so and so, it first states generally, and then says particularly “by neglecting to assume,” and so forth; or, “if he shall do so,” and then a forfeiture.

Now, as I stated during the argument, I am quite unable to see any substantial difference in the distinction which is here taken between the particular and the general. The word “particularly” must have one of two senses in this case; it must either mean, somewhat like our videlicet, that is to say, or to wit—scilicet, or videlicet, I enable you to see; or, I enable you to know what the generality immediately foregoing means,—it either means that, or it means

more especially. In the one case it is demonstrative, in the other case it is intensive. Now, suppose it is taken as demonstrative, and to mean a particularization of what went before, it is clear that it is restrictive as well as demonstrative, and it confines the preceding generality to that which follows under this specification. Well, if that is the case, there is a total end of the question altogether; therefore it is said that that cannot be the meaning. What then does it mean? It means intensive: I prohibit Six things, I irritate and resolve; that is to say, I declare five of those six things to be null and void in one way, and the whole six things to be null and void in another way. I denounce a forfeiture if five out of the six things are done in one way; in another way I denounce a forfeiture if the sixth thing is done. This is the construction contended for upon the respondent's side of the bar, and by the Court below, and upon which alone it can be distinguished from the Tillicoultry case, that he first denounces the resolution as to the whole six things, and then he more particularly follows it up by more intensely and more especially denouncing that as to five of the things. But is there any sense in that? The estate is either forfeited or not forfeited. You cannot forfeit six of those things sub modo and five out of the six things absolutely: you cannot forfeit six of those things half, as it were, but five of those things utterly and altogether, out and out. The thing is either forfeited or not. Then what sense is to be annexed to the kind of forfeiture which that construction of the clause denounces against the sixth thing, and the kind of forfeiture which alone, it is admitted, is denounced? The more especial and more

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intense forfeiture, which is denounced as to five of the things. It is quite clear to say, "If you go to York, or if you go to Rome, you shall forfeit your estate of "Blackacre," with remainder over to A.; this is intelligible. But is this intelligible? "If you go to York, or if you go to Rome, you shall forfeit your estate of "Blackacre; but more especially if you go to Rome you shall incur that forfeiture." Then what becomes of the act of going to York? It is either a forfeiture or it is no forfeiture at all; you cannot say that the intensive use of the word "particularly" makes it more a forfeiture to go to Rome than to go to York; otherwise you reject the first forfeiture altogether.

But it does not depend upon forfeiture; for here, differing from the Tillicoultry case, the framer of the instrument makes one conjunct clause, irritating the act of contravention at the same time that he denounces a forfeiture against the contravener. It is still more absurd than if you take the irritant clause only. Can a thing be half void?—and yet you must take that construction. And then the construction is this: not only you forfeit half if you go to York, and wholly if you go to Rome; but I declare the act,—whatever it is, of altering the order of succession or of selling,—I declare the act of selling to be half void—(to be only to a certain degree null and void,) but the act of altering the order of succession is absolutely, and to all intents and purposes, null and void. That is absolute nonsense. It is neither more nor less than mere nonsense. I am, therefore, clearly of opinion that the judgment cannot stand, that it fails wholly upon the grounds upon which it is rested, and I think

the reference made by Lord Jeffrey puts the case rightly, when he says the Prestonfield case is rather stronger than the present; and it does not appear to have received any particular attention from the Inner House in supporting the interlocutor of the Lord Ordinary.

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My Lords, I am exceedingly glad that we are relieved from the necessity of going upon the second branch of the case; not that I see any answer to it, because the words of the entail act are most positive, and this merely is a direction to which it signifies not whether it is complied with or no. The words are most imperative, and for a most salutary and necessary purpose. It is, that all the liege subjects of the King may see upon the face of the record whether they are in safety to lend their money upon the security of the estate, and pay the price out and out. It is for that purpose that the register of taillies is expressly provided by the act, and subsidiary to that registration so provided, it is declared as the necessary act of an entailor that he shall record the irritant and resolute clauses. If anybody were to see this instrument, without those clauses being specified, if there is no word said about there being such clauses in existence, he would have a right to say, "I am safe in lending money upon the security of the estate," or to lay out his money in the purchase of the estate, because there is not a word of irritancy in the instrument. But I am satisfied that we are not called upon to say a word, in giving our judgment, or to rest any thing upon that second ground; for this reason, that it does not appear to have attracted the notice of the Court below, since none of the Learned Judges dealt with it

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13th Mar. 1838. in their argument. It is said that it was mentioned in the Court below, and a reference to Shaw and Dunlop's cases seems to show that it was; but there is no answer given to it. Consequently, I do not think that it was much relied upon, because the other ground is quite sufficient for reversing the judgment.

I am therefore of opinion that this decision cannot stand; and that, as in the two former cases of Morehead v. Morehead, Steele v. Steele, your Lordships are restoring, and not altering or innovating, or breaking, the Scotch tailzie law, but restoring it to what it was; and that as you then restored the law established in the Findrassie case, the Randlestone case, and, above all, the Duntreath case, to its former purity, which had been broken in upon by those decisions of Steele v. Steele and Morehead v. Morehead in the Court below, I say here, you are restoring the Tillicoultry case; which, as far as I know, never had been altered by any thing done in the Court below till this decision, which I think was given without very great deliberation. I think it bears marks of that, either in the Outer or in the Inner. My reason for saying so is, that there was a total difference in the construction of the first part and the latter part of the clause; it never seems to have struck the Court below that the whole argument about "particularly" fails entirely here. They appear to have considered, both the bar and the bench, that the frame of the clause was such that the word "particularly" rode over the whole of it. But it is not so at all; the word "particularly" is followed by the adverbs "by neglecting, by possessing, by omitting, by altering," and applies to the first four communications only; but then there is a

sudden break, and change, which throws overboard the word "particularly" altogether. The future subjunctive mood is then substituted for the adverbs; instead of "by doing" so and so, over which the word "particularly" rides, and which it governs, it comes to be "or if he shall do" so and so, and so without any adverbial expression to connect it with "particularly." This is another indication that the case has not been thoroughly considered.

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My Lords, the consequence of this decision will be, that the former judgment, which has not been paid much attention to, will have more attention paid to it hereafter, and the construction of such deeds will be bound by this judgment hereafter; and that the law, will not be set afloat, as it would have been by setting up that which has never been supposed to be the law from the time of the Tillicoultry case, in 1799, till the present time. That case was most fully discussed. I find that Lord Meadowbank, one of the greatest authorities of our day, at first stood alone; but he said, "I have no doubt whatever about this." He took usually a firm and manly view of the subject; but always a very dispassionate view. He spoke very firmly upon the other side; but the Court sustained the defences. None agreed with him but Lord——.

But when it came before the Court again, in the year 1799, upon the answer, the question was, whether the paper should be answered or not? They then agreed to have an answer. When it came, instead of standing alone, he was in the majority—a narrow majority. In the minority stood Lord Glenlee, just as he stands in the majority, however, here, and as he stood in the majority in the case of Macgregor v.

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13th Mar. 1838, Macgregor at the time when the Learned Attorney General was compelled to say to the House, that it was impossible to maintain the law as laid down by his Lordship, consistently with the current of authorities upon the rules of construction. I have, therefore, no doubt whatever that this decision must be reversed.

The House of Lords ordered and adjudged, That the said interlocutor complained of in the said appeal be and the same is hereby reversed.

A. DOBIE—SPOTTISWOODE and ROBERTSON,
Solicitors.

[3d April 1838.]

Mrs. AGNES FORLONG, Widow of Lieutenant Colonel JOHN TAYLOR, and now Spouse of LAWRENCE ALFRED JOSEPH, Esq., Appellants and Respondents.—*Sir William Follett—A. McNeil.*

Dr. JAMES HOSSACK and others, Executors of Lieutenant Colonel TAYLOR, Respondents and Appellants.—*Spankie—Andrews.*

Husband and Wife—Clause.—Construction of a marriage-contract between an officer whose widow was entitled to the benefits of an annuity from the Bombay Military Fund, and which he bound himself to secure to his wife in case of surviving him, under which it was held (in part affirming and in part reversing the judgment of the Court of Session) that on a partial diminution of the amount of the annuity, and notwithstanding her second marriage, his estate was liable in payment to his widow of an annuity equal in amount to that which was originally payable from the fund.

LIEUTENANT Colonel John Taylor, in the East India Company's Service, was an original subscriber to the Bombay Military Fund, which was formed in 1816, "to provide for the families of officers left, by their death, destitute of an adequate maintenance, and to assist officers unprovided with aid, by the regulations of the service, or from their own resources, under such circumstances of urgent sickness as renders a voyage to England necessary for the preservation of their lives, and to afford such further aid as the funds shall admit, in cases of less urgent necessity."

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Certain annual sums were to be paid by the subscribers, and the following provisions were made :

“ Art. 1. The widows, legitimate children, and descendants of subscribers who were married on or before the 1st of November 1816, and the widows and legitimate children of subscribers who were married subsequent to that date, provided they are of unmixed European blood, though born in other quarters of the world, (four removes from Asiatic or African, being considered as European blood,) shall be entitled to receive the following annuities.

“ 2. The annuity however payable to the widows of subscribers is, in all cases, to be subject to a deduction equal to the amount of Lord Clive's pension.”

A table was then introduced, “ shewing the amount of pension to widows during their widowhood,” and containing this specification.

	Full pension.	Deducted amount of Lord Clive's pension.	Net pension payable by the military fund.
—	£ s. d.	£ s. d.	£ s. d.
“ Widow of a colonel or lieutenant-colonel commanding - - -	456 5 0	114 1 3	342 3 9
Widow of a lieutenant-colonel or member of medical board - - -	365 0 0	91 5 0	217 15 0
Widow of a major, superintending surgeon, senior chaplain, and chaplain above ten years standing (if subscribing in this class) - - -	273 15 0	68 8 9	205 6 3”

But it was provided, that “if a widow who is an annuitant on the fund should marry, her annuity shall cease during her coverture, but in case of her again becoming a widow she shall then be entitled to receive the annuity formerly granted to her. If also her second husband be a subscriber, it shall remain at the option of the widow to claim the annuity due to the rank of her first or second husband, but she shall receive no more than one annuity.”

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It was also conditioned, that “should the fund, however, at any period, fall short of the demands upon it, so that the annual income will not defray the amount of the annuities and other claims, then it shall be in the power of the directors to make a proportional deduction from the annuity of each annuitant, and from the payments to other claimants above the rank of subaltern, until the state of the fund shall afford the means of complete payment, when, if a surplus income exists, the arrears shall be made good from the amount of surplus, but not otherwise.”

In 1822, Colonel Taylor (who then held the rank of major) was in Scotland, and had paid his addresses to the appellant, Miss Agnes Forlong, daughter of Wm. Forlong, Esq., of Wellshot. The latter gentleman on the 2d of July of that year, addressed to Colonel Taylor this letter:

“My dear Sir,—We have had now two communings on money matters, preparatory to an important business proposed by you. I mentioned that if possible I would rather not advance any money yearly, though, if it was absolutely necessary for the

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“ support and comfort of my daughter when in India,
“ I would do so, even though it should narrow my
“ own income, and be also contrary to my inclination.
“ I therefore say that if you make a point of this, I
“ will agree to honour her draft on me from India for
“ 150*l*. sterling annually (first payment to commence
“ in three months after her arrival there, and to con-
“ tinue to be paid to her so long as I live). At my
“ death she will be entitled to receive the interest of
“ 500*l*. more; the principal sum of 3,500*l*. will then
“ be under the management of trustees, to belong and
“ be the property of herself and her family only. I
“ mentioned also that Mrs. Forlong having some money
“ of her own, may very probably make a considerable
“ addition to her and her children, but I will advance
“ no part of her fortune to you or her except what I
“ have mentioned of a yearly annuity. You mentioned
“ something of your own situation, and of your having
“ from five to six thousand sterling in India, and that
“ you would bind my daughter in 500*l*. a year of well
“ secured property in case of your death. Pray what
“ property will you leave and secure to children
“ (if you should have any) in that event? I suppose
“ all your funds. But I ask this last question from
“ what you mentioned in our last conference, re-
“ specting your intentions of allowing your sister 100*l*.
“ a year during your stay in Scotland. I have
“ been very candid with you, and I expect the same
“ candour from you in answer to this, as I wish to
“ show your answer to my family, as our two con-
“ ferences took place after dining, when on such an
“ important business they should have been after
“ breakfast.”

Colonel Taylor returned this answer on the following day.

“ My dear Mr. Forlong.—I have received your letter
 “ of yesterday, and am not sorry that you have thus
 “ given me an opportunity of explaining myself to you
 “ on money matters, for though with me it is a
 “ secondary consideration, I judged it but proper to
 “ ascertain the point, well knowing the strong inclina-
 “ tion many fathers have to leave all their property to
 “ the male branches of their family. Long ere I had
 “ any serious intention of paying my addresses to your
 “ daughter, or you by your kind hospitality and atten-
 “ tion had inspired me with the presumptuous hope of
 “ aspiring to her favour, I was given to understand she
 “ would have a fortune of 4,000*L*.; that, added to my
 “ own funds, at least 6,000*L*., and my full pay as
 “ a lieutenant colonel, would, in the event of ill health
 “ compelling me to leave India before I succeed to a
 “ regiment, enable us to live respectably. I say
 “ nothing of what may be done in the meanwhile by
 “ accumulation in India, for no man in my opinion
 “ should marry without providing the means of living
 “ somewhat in the same sphere of life to which both
 “ parties have been accustomed. These being my
 “ notions, I confess I am somewhat disappointed to find
 “ it otherwise. However, I have already said that money
 “ with me is a secondary object, and I am willing to
 “ have her fortune settled as you propose, with the
 “ exception of the concluding line, viz., ‘to belong
 “ ‘and be the property of herself and family only,’
 “ and for this good reason, that you would not add
 “ to her annual income, in case of my death, one
 “ farthing.

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" I shall endeavour to explain this to you on paper;
 " and farther to elucidate the subject, I take the
 " liberty of sending you the East India Register,
 " wherein you will find at page 336 that the widow
 " of a major is entitled to receive from the military
 " fund, of which I am an original subscriber, the sum
 " annually of - - - £273 10 0
 " Add half that sum secured from my own }
 " funds - - - - - } 136 15 0

£410 5 0

" A lieutenant colonel's widow to the }
 " sum of - - - - - } £365 0 0
 " Add half, as above stated - - - 182 10 0

£547 10 0

" A colonel's widow to the sum of - £456 5 0
 " Add half that sum, as above stated - 228 2 6

£684 7 6

" All this-I can do from my present funds, and the
 " remainder of what fortune I may die possessed of
 " shall be left to my children, if I have any, save and
 " except the sum of at least 100*l.* a year to my sister
 " Helen, should she survive me. In either of the two
 " latter cases above mentioned, it will require more
 " than the sum you mention to make up the addition
 " to the annuity, and therefore you will be surprised,
 " I hope not offended, at my objection, but it looks ill
 " for a man to die and leave his widow nothing, when
 " it is well known he has money to dispose of.

“ Do not, however, misunderstand me, for I am
 “ perfectly willing that every farthing you or Mrs. For-
 “ long may leave your daughter shall be at her own free
 “ disposal, provided you do not bind me down to any
 “ settlement, in addition to the Military Fund, as it
 “ would only injure me without in the smallest degree
 “ benefiting your daughter. Let the money you settle
 “ on her be at her own disposal and I am satisfied.”

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A contract of marriage was executed, which, after reciting the intention of the parties to marry, proceeded thus:—“ In contemplation of which marriage, the said John Taylor hereby binds and obliges himself, his heirs and successors, to do and perform all and whatever may be necessary and incumbent upon him as a subscriber to the Bombay Military Fund, to secure to his promised wife, in the event of his predeceasing her, the benefit of the pension or annuity payable from the said fund to the widow of a subscriber, according to the rank he holds or shall hold in the Company's army for the time; and failing thereof, or in case the said pension or annuity, from whatever cause, shall not be available to his promised wife in the event foresaid, saving and excepting only through her right to and possession of such separate funds as, by the rules and regulations of the said fund, would exclude her from all benefit thereby, then the said John Taylor binds and obliges himself, his heirs and successors, to make payment to the said Agnes Forlong, his promised wife, in the event of her surviving him, of a clear yearly jointure or annuity equal to the pension that has hitherto been paid or shall be payable from the said fund to the widow of a subscriber holding the same

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“ rank in the army which now belongs or shall belong
“ to the said John Taylor at the time of his death, and
“ that at two terms in the year, Whitsunday and Mar-
“ tinmas, by equal portions, beginning the first term's
“ payment of the said jointure or annuity at the first
“ term of Martinmas or Whitsunday that may happen
“ after the said John Taylor's death, and so on there-
“ after half-yearly during her life, with the lawful
“ interest; and declaring that in the event, and so
“ long as the said Agnes Forlong shall draw and
“ receive from the said Military Fund a pension or
“ annuity equal to the pension that has hitherto been
“ paid or that shall be payable therefrom to the widow
“ of a subscriber holding the same rank which now
“ belongs or shall belong to the said John Taylor at
“ the time of his death, or would have been entitled
“ to draw and receive such pension and annuity had
“ she not possessed such separate funds as, by the
“ rules and regulations of the said fund, exclude her
“ from all benefit thereby, as is before provided, the
“ personal obligation hereby undertaken by him shall
“ be suspended aye and while she is provided as afore-
“ said from the said fund, or has lost the benefit of
“ the fund from the cause above referred to; and for
“ a provision or jointure in favour of his promised
“ wife in the event of her surviving him, the said John
“ Taylor hereby assigns to the said Agnes Forlong,
“ the benefit of the pension or yearly annuity to which
“ she may be entitled as his widow from the said fund
“ as aforesaid, and also the benefit of the pension or
“ annuity payable from any other fund to the widow
“ of an officer of his the said John Taylor's rank in
“ the service of the said Honourable East India Com-

“ pany, and that agreeably to the rules and regula-
 “ tions of the said fund or funds respectively, and
 “ likewise all rights, title, and interest in the provision
 “ secured on the said Agnes Forlong, by her father,
 “ as after mentioned, renouncing, as the said John
 “ Taylor hereby for ever renounces, his *jus mariti*
 “ therein, and in all and every subject, means, and
 “ estate, real or personal, which the said Agnes
 “ Forlong may conquest, acquire, or succeed to in
 “ any manner of way during the subsistence of the
 “ said marriage, the administration and management
 “ whereof shall belong to the said Agnes Forlong
 “ exclusively. And farther, the said John Taylor
 “ hereby binds and obliges himself and his *foresaids*,
 “ to make payment to the said Agnes Forlong, in the
 “ event of her surviving him, of a reasonable sum
 “ for interim aliment for the period that may inter-
 “ vene between the day of his death and the first
 “ term at which her jointure or annuity may become
 “ payable, and which provision shall be a corresponding
 “ proportion of the yearly jointure or annuity to which
 “ she shall have right at the dissolution of the mar-
 “ riage, for the time that may elapse thereafter, till
 “ the first term of payment thereof arrives.” There
 then followed certain provisions for children: “ And
 “ which provisions, conceived in favour of the said
 “ Agnes Forlong, and the child or children of the said
 “ marriage respectively, shall be accepted of, and
 “ she, with consent of her said father, hereby accepts
 “ thereof for herself and her said children, in full
 “ satisfaction of all and every thing which she or her
 “ said children could by law claim, ask, or demand
 “ in any manner of way by and through the said John

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" Taylor's death, or which her executors or nearest
" of kin could ask or demand, in the event of the
" said Agnes Forlong's predeceasing him."

On the other hand, Mr. Forlong came under the following obligations: He bound himself, " during
" the term of his natural life, to make payment to
" the said Agnes Forlong and John Taylor, upon their
" joint receipt, or upon the receipt of the survivor of
" them, or upon the receipt of their or of the survivor's
" lawful attorney or attorneys (the said William Forlong
" being always in life), of a free yearly annuity of 150*l*.
" sterling, payable in Glasgow at two terms in the year,
" and declaring that, on the death of the said William
" Forlong, the foresaid annuity of 150*l* sterling, pay-
" able as aforesaid, shall absolutely cease and deter-
" mine for ever. And the said William Forlong binds
" and obliges himself, his heirs and successors, to
" make payment to the trustees hereafter named, and
" to the survivor of them, at the first term of Whit-
" sunday or Martinmas which shall occur after his
" death, of the sum of 3,500*l* sterling, provided Mary
" Forlong, his wife, shall have then predeceased him,
" but if the said Mary Forlong shall be then in life;
" then only to make payment of the sum of 3,000*l*.
" sterling, and the remaining 500*l* sterling at the first
" term of Whitsunday or Martinmas which may happen
" after her death." Certain stipulations were then
made unnecessary to be noticed, and trustees appointed;
and it was declared, " that the said provisions shall be
" accepted of, and are hereby accepted, in full satis-
" faction to her of all and every thing which the
" said Agnes Forlong or her husband, or her heirs,
" executors, and successors, could claim, ask, or de-

“ mand in name of bairns part of gear, legitim,
 “ portion natural, executry, or otherwise in any manner
 “ of way, from the said William Forlong during his
 “ life, or from his heirs and successors, by and through
 “ his death, his own good will allenary excepted.”

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The marriage took place, and the parties proceeded to India, where Major Taylor rose to the rank of Lieutenant Colonel, and died in 1828, leaving his widow and one child surviving. By a testament he appointed the respondents to be his executors, and directed his funds to be secured for behoof of his child, whom failing, to certain other parties; and he stated, “ no provision
 “ is herein made for my wife, Agnes Forlong, she
 “ being already amply provided for by the marriage
 “ contract signed and sealed at Wellshot House in
 “ August 1822.” The deduction in respect of Lord Clive's pension having been made by the directors of the Bombay Fund, the respondents declined for some time to make up the amount, but ultimately did so. Thereafter, in consequence of a failure of funds, the directors caused a reduction to be made on all the annuities, by which the sum payable to the widow of a Lieutenant Colonel was reduced to 250*l.*, and after deducting Lord Clive's pension, 158*l.* 15*s.* The appellant having insisted that the executors were bound to pay her the difference, so as to make up her annuity to the original amount, and to do so without deduction of Lord Clive's pension, and in the event of her second marriage to continue to pay the same, and they having refused to comply, she brought an action before the Court of Session to have decree pronounced to the above effect.

In defence it was maintained, that, according to a

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sound construction of the contract, the obligation undertaken by Colonel Taylor was merely to pay up the rates and comply with the other conditions of the Bombay Military Fund, so as to secure the annuity, (of whatever amount it might be) to the appellant, and subject to all the rules as to its duration.

The Lord Ordinary, on 11th July 1838, pronounced this interlocutor: " Finds, that upon a just construction
" of the marriage contract libelled, the pursuer is
" entitled (except in the special case therein expressly
" excepted) to a free yearly jointure or annuity out of
" the funds and estate of her late husband, of such an
" amount as, along with what she may draw from the
" Bombay Military Fund, shall make up an annual
" allowance of 365*l*, and that for all the days of her
" natural life, and whether she shall or shall not enter
" into any second or other marriage; and therefore
" repels the defences, and declares and decerns in terms
" of the conclusions of the libel; finds expenses due."
" Note.—There is some difficulty in this case, from
" the consideration that the amount of provision from
" the Military Fund must have been known to be liable
" to fluctuation, and the pursuer would clearly have
" had the benefit if the rates had been raised instead
" of lowered subsequent to her husband's decease.
" But considering the plain equity and expediency
" (and consequent presumption of intention) of ren-
" dering the conventional jointure of a widow (for
" which she had conveyed a large tocher, and renounced
" her legal right,) in some measure fixed and secure,
" the Lord Ordinary can put no other construction
" upon the very broad words of the subsidiary obliga-
" tion of the husband, in all cases ' where the pension

“ ‘shall not be available from any cause whatever,’ to
 “ make up the deficiency, than that they entitle her
 “ to have it at all times made up to the sum which the
 “ fund either yielded or might have yielded at the
 “ period of the husband’s death. If it had not this
 “ meaning, it is difficult to understand why it was at
 “ all introduced, and it is obvious that if not so guarded
 “ the provision might fluctuate in the most distressing
 “ manner or substantially fail altogether, without the
 “ widow having any resource whatever. Take even
 “ the case first contemplated for a recourse on the
 “ husband’s estate, and which the defenders represent
 “ as most favourable for their construction of the whole
 “ clause, viz., the case of the widow having no claim on
 “ the fund, in consequence of the husband’s having
 “ forfeited all right to it before his death, by neglecting
 “ to do what was necessary to keep it up, withholding
 “ his termly contributions, or otherwise. Suppose that
 “ in this way the husband had ceased to have any
 “ interest in the fund ten years before his death, what
 “ would then have been the claim of the widow on his
 “ private estate? Would it have been for a fixed
 “ and invariable jointure or life annuity of the same
 “ amount as she would have drawn the first year of
 “ her widowhood from the fund, if she had had right
 “ to it? Or to an annuity fluctuating with every
 “ variation in the state or regulations of a foreign
 “ fund, out of which she was never actually to receive
 “ any thing, and with which her husband had had no
 “ connexion for years? Even in that case the Lord
 “ Ordinary would decide for the fixed annuity, and
 “ would hold that the fund was only to be looked at
 “ as the army list was to be looked at, viz., in order to

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“ascertain by the one what rank was held by the
“husband at his death, and by the other what was
“the amount then payable to the widow of such an
“officer from the fund. Those things it would be
“necessary to ascertain, because they were the elements
“by which the amount of the life annuity out of the
“husband's estate was directed by the contract to be
“fixed. But, except for that purpose, the parties had
“nothing to do with the fund, nor with its past or
“future fluctuations. In the case that had occurred,
“the widow was to be provided wholly and entirely
“by a jointure out of the husband's estate, and it was
“only to settle its amount that a fund with which he
“had once been connected was referred to. But that
“amount being once settled a right for all the rest
“of her life was a right to her jointure out of property
“in Britain, and nothing could be more contrary to
“the nature and object of such a provision than to
“suppose that it was to vary with the variations of a
“foreign institution in which none of the parties had
“any interest, and that the husband's representatives
“were to send out to Bombay every six months,
“before they could know with what jointure his estate
“was chargeable.

“But the actual case is much stronger, for the
“contract expressly provides that the widow shall have
“recourse for a jointure to the husband's estate, not
“only if he fail to do all that depended on him to give
“her right to the fund, but if ‘from any cause what-
“soever, the said pension shall not be available to
“her.’ Now, what pension is it that is here spoken
“of, and what is meant by its not being available?
“To the Lord Ordinary it appears plain that it is the

“ pension payable to the pursuer at the time of her
 “ husband’s death, and that it ceases to be available
 “ when more than one half of it is withheld.

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“ The defenders seemed chiefly to rely on the clause
 “ in the contract, by which the pension from the fund
 “ is made over, ‘ agreeably to the rules and regulations
 “ ‘ of the said fund;’ and on the allegation that it was
 “ in accordance with one of those regulations that its
 “ amount had been recently abridged. Now, the
 “ Lord Ordinary is of opinion, that the rules and
 “ regulations here referred to, mean only the rules as
 “ to the mode and manner of payment,—the certificate
 “ to be produced,—the agents to be applied to, &c.,
 “ and not conditions of restriction or forfeiture of the
 “ pension itself; and he thinks this construction is
 “ confirmed by that which, at all events, furnishes a
 “ conclusive answer to the whole defence, viz., that the
 “ clause binding the husband to provide a jointure
 “ if the pension shall from any cause cease to be
 “ available, is qualified by one anxious and express
 “ exception, which would be altogether unmeaning
 “ and unnecessary, if the pension had been understood
 “ to be given under the peril of those rules and
 “ regulations, which imported a contingent forfeiture
 “ or restriction. The exception is, that in spite of the
 “ broad and general words already quoted, the husband
 “ shall not be liable for a jointure, in the case of the
 “ pension not being available to the widow, ‘ through
 “ ‘ her right to and possession of such separate funds
 “ ‘ as by the rules and regulations of the said fund
 “ ‘ would exclude her from all benefit thereby;’ and
 “ it is anxiously provided, that ‘ saving and excepting
 “ ‘ that case only,’ he shall be liable for jointure

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“ whenever, from whatever cause, the pension shall not
“ be available. Now, it is utterly impossible to explain
“ or account for the introduction of these words, except
“ upon one of two suppositions, both equally conclusive
“ in the pursuer's favour; either, first, that the rules and
“ regulations referred to in the clause assigning the
“ pension did not mean rules and regulations of this
“ description at all; or that they were all meant to be
“ superseded (except in the case specially excepted)
“ by the important, and the Lord Ordinary will
“ add, most just and necessary, clause, binding the
“ husband to supply, from his own estate, what
“ might from any cause be actually deficient in the
“ provision.

“ The defenders seemed also to maintain that the
“ pension, though diminished in amount, was in
“ point of fact, still available to the pursuer; that it
“ had not been evicted, as they expressed it; and that
“ though compensation might be due for a total priva-
“ tion it was not for a partial. To the Lord Ordinary,
“ however, this seems quite untenable, considering the
“ onerous and favourable nature of the claim especially.
“ Suppose that, instead of being reduced from 365*l.* to
“ 158*l.*, it was reduced to 5*l.* or 5*s.*, do the defenders
“ really maintain, that in that case the husband's
“ estate is to pay nothing, while it would have been
“ chargeable with a jointure of 365*l.* if the 5*s.* also
“ had failed, and was reduced to nothing? If the Lord
“ Ordinary be right in thinking that the obligation
“ truly was to secure an annuity equal to the pension-
“ as at the husband's death, then it is plain that the
“ obligation became prestable whenever any part of
“ that was withheld, or when her provision was

“ diminished, whether by a third or a half, or the
“ whole.

“ It is needless to say any thing as to Lord Clive’s
“ fund, from which it is admitted the pursuer never
“ received any thing, and to which it is obvious that
“ she never was entitled.

“ The argument that the pursuer must forfeit all
“ claim on her late husband’s estate, as well as on the
“ fund, if she should ever marry again, is of course
“ sufficiently answered, if the Lord Ordinary is right
“ in holding that the clause relied on by the pursuer
“ supersedes, and was intended to protect her against,
“ all forfeiting regulations, except that which is specially
“ excepted. But the terms in which the obligation to
“ grant a jointure is conceived, seem to have been
“ intended specially to exclude this particular case.
“ For, while the regulations expressly bear that the
“ widows shall enjoy their pensions ‘during their widow-
“ hood, and not otherwise,’ the jointure to be provided
“ to the pursuer is expressly covenanted to be paid
“ half-yearly ‘during her life.’”

The respondents having presented a reclaiming note to the Second Division of the Court, their Lordships appointed the parties to prepare cases, which having been done, they directed the papers to be laid before the other Judges for their opinion, whether or not the interlocutor of the Lord Ordinary ought to be adhered to.

The following opinions were thereafter delivered by their Lordships:—

Lord President and Lord Gillies.—We are of opinion that the interlocutor of the Lord Ordinary is well founded, and ought to be adhered to; and as we en-

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tirely agree in the views taken by the Lord Ordinary in his note, we do not think it necessary to assign any other reason for our opinion.

Lord Fullerton.—I think the judgment of the Lord Ordinary right; and in the main, I concur in the reasonings by which the interlocutor is supported.

But, in addition, I may be permitted to express a doubt, whether one consideration, supposed to create the chief difficulty of the case, has not been somewhat hastily assumed. I see no ground for holding, that the rates of provision from the Military Fund were known to be subject to rise or fall. In the first place, even according to the "regulations of the fund," founded on by the defenders, I see no provision for, or allusion to, any rise of the rates; and, secondly, I think it quite clear from the previous correspondence of the parties, that the only information held by the lady's father on the subject of the Military Fund and its regulations, was that given in the East India Register of 1822, in which there is not a word of the power of the directors to reduce the rates. On the contrary, the sums there specified, are described "as the annuities which the "widows are entitled to receive;" those annuities being subject, indeed, to certain conditions and deductions, but in other respects dependent only on the rank held by officers at their death. And it is to be observed, that those specified annuities are not only generally referred to, but are proved by the correspondence to have formed the data on which various other pecuniary calculations entering into the contract were framed.

Considering that this was information communicated by Colonel Taylor, one of the contracting parties, and evidently acted on by the other, I hold myself entitled

to look to it in canvassing those disputed or ambiguous passages of the contract, on which the defenders now endeavour to fix a construction, decidedly unfavourable to the party to whom those representations were made.

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Keeping this in view, I think both the letter and the spirit of the contract are in favour of the pursuer's claims.

By the leading clause, Colonel Taylor binds himself to perform whatever may be necessary for him, "as a subscriber to the fund," to secure to the lady, on his predecease, "the benefit of the pension or annuity payable from the said fund to the widow of a subscriber according to the rank he holds or shall hold at the time." And he afterwards assigns that pension or annuity to the lady, which assignation, however, was no more than a mere form; as, if the subscriptions were paid, the annuity must have taken effect in her favour without it. If the matter had rested there, she probably might have been held to confine her claims to the benefit of the Military Fund, subject to all the hazards attending it. But it is needless to inquire into this, because, by the contract, there is expressly super-added a personal obligation on the part of Colonel Taylor; and the whole question turns on the meaning of that obligation.

By it, failing his performance of what is incumbent on him as a subscriber, "or in case the said pension or annuity, from whatever cause, shall not be available to his promised wife," saving and excepting one case, (which it is unnecessary here to notice,) he binds himself to pay to the lady "a jointure or annuity equal to the pension that has hitherto been paid or shall be

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“ payable from the said fund to the widow of a subscriber holding the same rank in the army which now belongs or shall belong to the said John Taylor at the time of his death.”

The first question here regards the contingency on which the personal obligation is to be called into operation, viz., whether it comprehends the case of the deficiency of the Military Fund? Now, upon this, I cannot entertain a doubt. The parties, in the passage immediately preceding, had been dealing with the “ pension or annuity payable from the fund to the widow of a subscriber according to the rank he holds or shall hold in the company’s army.” In construing a marriage contract, a deed intended to regulate the pecuniary interests of parties, it would be absurd to suppose, that those expressions bore reference merely to the source from which the annuity was payable, and not to its actual amount; and, accordingly, it is proved in this case by the previous correspondence, that the East India Register was sent to the lady’s father for the very purpose of showing what the amount of that pension or annuity was. The “ said pension or annuity,” then, I hold to mean, in sound construction, that pension or annuity which, according to the husband’s representation, was payable from the fund, viz., a certain amount in pounds, shillings, and pence; and there is the less difficulty in this, because there is no dispute that at the time his representation was true. It seems to me to follow, that “ such pension or annuity ” ceases to be “ available,” when the party by whom it is due cannot pay it. The term “ available ” includes the two conditions, of the title of the creditor on the one hand, and the capacity of the

debtor to pay on the other; and cannot remain applicable where only one of the conditions exists. It would be rather startling to maintain expressly, what is done by implication here, on the part of the defender, that a widow's right to an annuity from an insurance office or benefit society must, in a question with her husband's representatives, who are subsidiarily bound, be held to be "available" to her, merely because she has a right to make the demand, and independently altogether of the consideration how far the society or insurance office is enabled to meet it.

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The only other point then to be inquired into is the extent of the personal obligation come under by the husband. He is bound to pay a jointure or annuity, equal to the pension "that as hitherto been paid, or "shall be payable," &c. And it is here that, in my opinion, the only difficulty lies; because the words may admit of the inference, that the parties had in view the possible fluctuations of the rates of allowance from the fund.

But, in the first place, that inference is not absolutely necessary. It may merely be a tautological form of expression, suited in the tense to the double or alternative form of the conclusion of the sentence, in which reference is made to the rank "which now belongs or "shall belong to the said John Taylor at the time of "his death;" according to which view, the future or contingent form of expression would merely apply to the change of rate which might arise from the husband attaining before his death a higher rank than that which he then held. At all events, and even admitting the expression to be dubious, I am bound to adopt that one of the two constructions which is most consistent

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with what I consider to be the only admissible presumption, viz., that the parties contemplated no other fluctuation of the amount of the annuities than that which arose from the gradations of military rank.

But, secondly, I rather think, that even on a stricter examination of the terms employed, the clause in question is quite consistent with the claim now made by the pursuer. For here, too, the defender's argument will be found to assume a particular sense of the term "payable," viz., that which the Military Fund does or can pay. But that is not the only sense, nor is it the most usual sense; certainly not that which must be adopted in construing a subsidiary obligation of this kind. Its most ordinary, and, as I think, its legitimate meaning is, what the debtor ought to pay, in other words, that which is due. Now, in this sense, the original annuity is still payable. The clause in the regulations referred to by the defenders does not authorize the directors to wipe off the debt, but only to oblige the annuitants to accept a dividend under an express reservation of their claims, if the funds of the institution ever afford a surplus. It provides, that if the "fund falls short, the directors shall have the power to make a proportionable deduction from the annuity of each annuitant, until the state of the fund shall afford the means to complete payment, when, if a surplus income exists, the arrears shall be made good from the surplus but no otherwise."

It does not appear to me that, even by this clause, the annuities, as originally fixed, have absolutely ceased to be "payable." Therefore, even if it could be shown, which it is not, that the marriage contract was framed in the knowledge and contemplation of that clause of

the regulations, I should rather think that the words "which shall be payable," must be held not to limit the personal obligation to that which, independently altogether of such obligation, the widow could get from the fund, but to bind the husband to make good the annuity, which, though continuing "payable" or "due," the Military Fund might be at the time unable to pay.

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From the great difference of opinion which has arisen on this case, it would be presumptuous to deny its difficulty. But, upon the fullest consideration which I have been able to bestow on it, I cannot help thinking, that unless an unusually rigorous interpretation should be adopted in construing this marriage contract, the claims of the widow must be sustained.

Lord Jeffrey.—I entirely concur in this opinion: I do not think I had any other variation in view than that which might arise from the husband's advancement in military rank. I have nothing material to add, except that the clause in the contract which contemplates the temporary suspension of the widow's available right to the fund, and makes her claim on her husband's estate defeasible on the revival of such available right, taken along with the clause in the regulations, entitling the widows, whose allowances have been restricted, to "complete payment" out of any surplus that may afterwards accrue, appears to me to afford a strong confirmation of the view adopted in the preceding opinion, and in my original interlocutor.

Lord Cockburn.—I am of opinion that the interlocutor of the Lord Ordinary ought to be reversed.

I can see nothing in the contract, as it actually stands, except an obligation by the husband to keep up

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his interest in the Military Fund, and an assignation to his widow of the benefit of it after his death, whatever it might at any time amount to. Her "provision or jointure" is expressly declared to consist of "the benefit of the pension or yearly annuity to which she may be entitled, as his widow, from the said fund, &c., agreeably to the rules and regulations." There is no guarantee that the fund shall produce any particular annuity. On the contrary, when he anticipates that it may not be available to her, and engages to provide a substitute, he only binds himself to pay her a yearly sum "equal to the pension that has been paid or shall be payable from the said fund to the widow of a subscriber holding the same rank in the army which now belongs or shall belong to the said John Taylor at the time of his death." These last words were plainly not intended to fix, and do not, in fair construction, import that the annuity which the fund might happen to afford at his demise should, in all time coming, be kept up out of his estate. They merely import that she should receive the pension, whatever it might periodically be, due to the widows of those holding the same rank which her husband held when he died. There is no obligation to make up deficiencies below this as a fixed sum. The only failure that he provides for is a total one; and, accordingly, the only substitute created is, not that any deficiency shall be supplied, but that the widow shall receive out of his estate "a pension equal to what shall be payable from the said fund." It was surely not meant that he should pay her a sum equal to what she got from the fund.

I hold, therefore, that the parties had a source of



income liable to variation in their view, or at least that, though they may not have thought of this at all (which is not improbable), the deed they executed implies it, and that, though unfortunate results may be stated as arising out of partial or nearly total failures of the fund, it is not the business of a Court to correct this. Arrangements by assignments of property liable to change in its productiveness, such as shares in the public stocks, are not uncommon, and similar results are incident to them all. The Military Fund might possibly have risen instead of fallen, and the widow have got the benefit of this rise.

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I am further of opinion, that her losing the military pension, by entering into a second marriage, was not an event for which her husband's estate must provide. I am aware that he makes his "property responsible if "the pension shall become unavailable, from whatever "cause, saving and excepting only through her right "to and possession of such separate funds as, by the "rules and regulations of the said fund, exclude her "from all benefit thereby." But I do not think that these words can reach the case in which the fund is made unavailable by the act of the wife herself. There are many acts of hers, besides contracting a second marriage, by which she may deprive herself of the benefit of it. She may decline to claim or may omit the periodical certificates or affidavits. Can it be maintained that her late husband's property and heirs are to suffer by such proceedings, whereby she, having the full benefit of the fund, chooses to forego it? It would require very unequivocal words indeed to sanction such a result—a result which I am the more inclined to

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resist, from the extreme improbability that it was ever intended to enable the widow to marry a second time at the expense of her first husband, and to reach his property by voluntarily quitting her hold on a prior equivalent provided by him. The Military Fund has not proved unavailable from any cause, but she has renounced it.

Lords Corehouse and Moncreiff.—The interlocutor of the Lord Ordinary finds, that, “upon a just construction of the marriage contract libelled, the pursuer is entitled (except in the case therein expressly excepted) to a free yearly jointure or annuity out of the funds and estate of her late husband, of such an amount as, along with what she may draw from the Bombay Military Fund, shall make up an annual allowance of 365*l*,” and that for her life, whether she marries again or not. The question proposed for our opinion is, whether the interlocutor ought to be adhered to.

We have read the marriage contract carefully. We do not find that there is expressed in it any obligation for a specific annuity of 365*l*., to proceed either from the Bombay Fund or from any other source. The contract appears to be framed on a different principle.

The funds brought by the lady are secured in a certain manner for her own benefit; and it was of course foreseen, that, if she should be left a widow, she would in all events enjoy the benefits of those provisions.

The husband, however, in consideration of the marriage, and any other benefits given to him by the contract, came under a clear and definite obligation in favour of his wife, which, though it ought to be fairly and liberally interpreted in her favour, cannot be

changed into any thing different from what it is, according to the plain terms employed to express it.

It is very clear that the marriage contract does not bear any express obligation for the specific annuity assumed in the interlocutor. But it is supposed, that, on considerations of equity and expediency, it should be presumed that the intention was to make it fixed and secure. We are of opinion that it was intended to make the annuity fixed and secure, so far as that was consistent with the nature of the only obligation undertaken, or which there is any indication of an intention on the part of the husband to undertake. But we cannot discover any ground in the provisions of the deed for presuming that there was any intention, in the one party or the other, that the annuity should be warranted or guaranteed to be of any fixed amount.

The obligation is simple and clear,—“to do and perform all and whatever may be necessary and incumbent upon him, as a subscriber to the Bombay Military Fund, to secure to his promised wife, in the event of his predeceasing her, the benefit of the pension or annuity payable from the said fund to the widow of a subscriber, according to the rank which he holds or shall hold in the company's army for the time.” This is the main and leading obligation. It binds to a specific duty, but to no precise sum of annuity to be secured by means of it. If the duty be fulfilled, it manifestly rests on the contingency of the amount payable by the rules of the fund what the annuity shall be. But, if the right against that annuity fund be made secure, that seems to us to be fulfilment of the obligation, so far at least as the above quoted words go.

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But the clause of the contract proceeds: — “ and
“ failing thereof, or in case the said pension or annuity,
“ from whatever cause, shall not be available to his
“ promised wife, in the event foresaid (her surviving),”
saving and excepting the case of her being excluded
from the fund in consequence of the possession of
separate funds, “ then the said John Taylor binds and
“ obliges himself,” &c. to pay to his wife surviving him
“ a clear yearly jointure or annuity, equal to the pen-
“ sion that has hitherto been paid or shall be payable
“ from the said fund to the widow of a subscriber
“ holding the same rank in the army which now be-
“ longs or shall belong to the said John Taylor at the
“ time of his death,” &c. In a subsequent clause,
the contract farther declares that, for a provision to
his promised wife, Major Taylor assigns to her “ the
“ benefit of the pension or yearly annuity to which she
“ may be entitled, as his widow, from the said fund,
“ and also the benefit of the pension or annuity pay-
“ able from any other fund to the widow of an officer
“ of his the said John Taylor’s rank in the service of
“ the said Honourable East India Company, and that
“ agreeably to the rules and regulations of the said
“ fund or funds respectively.”

Taking all these clauses together, it appears to us
that the only obligation undertaken is to do the acts
necessary for securing the widow’s right to the pension
or annuity which, according to the rules and regula-
tions of the Bombay Military Fund, should be payable
to the widow of an officer holding the rank which
Major Taylor should last have held preceding his
death; with a further guarantee, that if that pension,

whatever its amount might be according to those rules, should from any cause, except one event, become unavailable, that is, cease to be payable, his representatives should be bound to make good an equal annuity according to the same rules.

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The clause which is thought to sanction a different construction is that beginning with the words, "and failing thereof, or in case the said pension or annuity from whatever cause, shall not be available to his promised wife." There are here two things; 1st, "and failing thereof." Failing what? Clearly it is, failing Major Taylor's doing and performing what was necessary to secure the pension "payable from the said fund" according to his rank. So far the matter is clear, and can admit of no doubt. It is his failing to pay the subscriptions, and comply with any other rules of the institution affecting him. But if he did do and perform all that was necessary, there was no failure in this point; and his engagement being fulfilled, the alternative provided on such failure could not come into operation, whatever might be the amount of the pension payable according to the state and existing rules of the fund. But, 2d, there is another case supposed,—“or in case the said pension or annuity, from whatever cause, shall not be available” to the wife. We may not exactly see all the events contemplated, in which the pension might not be available in the meaning of the clause, notwithstanding that Major Taylor had done all that was necessary for securing it. If it be held to be clear, that the words cover the event of the widow marrying a second husband, by which, according to the rules, she is said to forfeit the benefit for the time, there is at least one clear case in which

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the words have a precise and very appropriate operation: and we are of opinion that this is the sound construction. But the first question here stands quite independent of any such difficulty as to the events contemplated. "Shall not be available." In case what shall not be available? The words are express:—"In case the said pension or annuity" shall not be available. Whatever may be the causes contemplated, the thing supposed to become unavailable is the pension payable to the widow of an officer of such rank by the rules of the society, and nothing else. There is not one word of provision as to the amount of such pension; and, therefore, whenever the pension payable to the widows of other officers of the same rank was equally available to the wife under this contract, it seems to us very clear, that the case of the pension being unavailable had not taken place, whatever might be the amount thereof.

It must be observed, that the deed contains no determination of the pension as fixed in the amount at any particular time, or at the death of Major Taylor. We understand the principle of the fund to be different, and that the pensions may rise or fall after the officer's death, according to circumstances. And the obligation of this contract is framed accordingly in perfectly indefinite terms. In the first binding words there is nothing said of the time of Major Taylor's death; and in the penal or alternative obligation, on failure, or the pension not being available, while the thing to be done is again simply to secure "a jointure or annuity equal to the pension that has hitherto been paid, or shall be payable, from the said fund," there is still no reference to any fixed time at which the amount of

such pension shall be definitely determined. The words in the first clause, "for the time," and those at the end of the last, "at the time of his death," evidently refer, not at all to the payment or the emergence of the annuity, but solely to the rank which Major Taylor might hold in the army. It is an annuity equal to the pension which has been or shall be payable to the widow of a subscriber "holding the same rank in the army which now belongs or shall belong to the said John Taylor at the time of his death." His rank could not vary after his death, and therefore it is defined. But the pension described is that only which might be payable to the widows of subscribers of the same rank; and if in their case it varied in amount, we are of opinion that the pursuer gets all that was provided for her, and all that she could not have got if Major Taylor had failed to secure the pension, if she receives the pension which is payable to the widows of other subscribers according to the rules of the society.

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We are, however, of opinion, that the event of the pursuer entering into a second marriage, (which we understand has taken place,) whereby, by the rules of the fund, she forfeits, under certain qualifications, the benefit of the pension, must be held to be a case in which the pension has become unavailable in the sense of the contract, and the obligation to pay an equal annuity takes effect. We are of this opinion, because this is a case in which, without any reference to amount, the pension has become unavailable altogether, from a certain cause, which must be presumed to have been contemplated; and because, although this arises from a certain rule of the fund, the special exception

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introduced immediately after the supposition of the pension, from whatever cause, becoming unavailable, viz., "saving and excepting only through her right to " and possession of such separate funds as by the rules " and regulations of the said fund would exclude her " from all benefit thereby," renders the inference inevitable, that, while that was a case in itself, if not excepted, comprehended in the meaning of the pension not being available, the other case, of its becoming unavailable by a second marriage, was also comprehended, and, not being excepted, must bring the alternative engagement into operation. But we are of opinion that the annuity to be paid as long as the exclusion from the fund continues, can be no more than the amount of the pension payable to other widows of officers of the same rank who have not incurred the forfeiture.

We are, therefore, of opinion, that the interlocutor of the Lord Ordinary ought not to be adhered to, but ought so far to be altered as to find, that the annuity payable cannot be greater in amount than the pension from time to time payable from the Bombay Military Fund to the widow of an officer of the same rank.

Lord Mackenzie.—I concur in the above opinion of Lords Corehouse and Moncreiff.

Lord Balgray.—I concur in the above opinion, so far as regards the first point, that there is no obligation created by the contract for a specific annuity; but I concur with the opinion of Lord Cockburn as to the point regarding a second marriage.¹

¹ Lords Justice Clerk and Meadowbank were for adhering. Lord Glenlee concurred as to the second marriage, but was inclined to alter *quoad ultra*, while Lord Medwyn was for altering *in toto*.

The Court, on 24th November 1836, pronounced this interlocutor: "The Lords having resumed consideration of this case, with the opinions of the consulted judges, Find that the defenders, as executors of the deceased Colonel Taylor, are bound to make up any deficiency in the pension or annuity payable to the pursuer from the Bombay Military Fund, arising in consequence of her second marriage. Quoad ultra, alter the interlocutor complained of; sustain the other defences, and assoilzie the defenders, but find no expenses due, and decern."¹

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Mrs. Taylor (now Mrs. Joseph) presented an appeal against this judgment, except in so far as it found the executors of Colonel Taylor bound to make up the deficiency in her pension arising in consequence of her second marriage. The executors entered a cross appeal against the judgment upon that point.²

LORD CHANCELLOR.—My Lords, there is a case which was heard before your Lordships yesterday, and the previous day of sitting, in which I was desirous of taking an opportunity of minutely examining the reasons given by the learned Judges of the Court of Session in support of the various views which they have taken upon the subject of this cause, there having been a great difference of opinion delivered by those learned Judges. Upon one point they divided ten to three, and on the other they divided seven to six.

¹ 15 S., D., & B. 126.

² As the arguments of the parties, and the views enforced by them, are fully brought out in the opinions of the Judges, it is unnecessary to give any further detailed statement of them.

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My Lords, the case arose upon a marriage contract between Major Taylor and Miss Agnes Forlong. It appears that the intended husband, Major Taylor, being an officer in the service of the East India Company, had been a subscriber to what is called the Bombay Fund, the object of which is to secure to the widows of officers subscribing, a certain annual payment during their widowhood. My Lords, there were produced, and commented upon, at your Lordships bar, several letters which passed before the execution of the contract. There was also produced, and commented upon, the will of the husband made at a time considerably subsequent to the date of the contract. My Lords, I apprehend, according to the strict rules of evidence, those documents ought to be entirely rejected; rejected so far as they might be supposed to be produced for the purpose of putting any construction upon the instrument itself. The marriage contract must speak for itself; the rights of the parties must be ascertained from the language of that marriage contract, and not from any thing which may have passed before, and still less from any thing which may have passed afterwards; at the same time it is certainly within the rules of evidence, and therefore may legitimately be looked into to see what were the circumstances existing at the time the marriage contract took place. The marriage contract speaks of a certain pension. Now, what that pension was, and what knowledge the parties had of that pension, are subjects as to which these documents may be looked at for the purpose of explaining the intention in the marriage contract itself, every court of justice having a right to have all the information which was in the possession of the parties contracting to place itself

and in the situation of the parties for the purpose of putting a construction upon the instrument to which they have become parties.

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My Lords, it appears that in the correspondence between the father of the lady and the intended husband, he stated the title which, by having become a subscriber, belonged to him in the pension in question, and he referred to the East India Register as containing the particulars of that annuity. My Lords, I refer to that, because it appears that there are some provisions in the regulations themselves which were not to be found in the Register to which the intended husband referred in his letter. He says, "I shall endeavour to explain this " to you on paper ; and farther to elucidate the subject, " I take the liberty of sending you the East India " Register, wherein you will find, at page 336, that " the widow of a major " (the rank he then held) " is " entitled to receive from the Military Fund, of which " I am an original subscriber, the sum of 273*l.* 10*s.* " annually ; a lieutenant-colonel's widow " (which was the rank he held at the time of his death) " the sum " of 365*l.*"

Now, the Register to which he referred, and which must therefore have been part of the subject matter under the cognizance of the parties when they entered into the contract, contained these provisions, " The " widows and legitimate children of deceased officers, " whose income may not exceed one half of the specified " pension, shall be entitled to receive the following " annuities ; viz., widows during their widowhood, and " not otherwise, of a lieutenant-colonel, 365*l.*" It then states, under the head of deductions, " First, the amount " received from Lord Clive's Fund ; secondly, all in-

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“ come above half the amount of the pensions.” My Lords, with that information with respect to those pensions to widows before them, the parties entered into the contract. Now, it appears that the pension to which the widow of this officer would, according to the regulations, have been entitled, has been subject to three different descriptions of deduction, one, indeed, suspending the payment altogether. She has married a second husband—the pension, by the regulations of the Bombay Pension Fund, is only during widowhood—she, therefore, has during the period of her second marriage, and so long as that may continue, no right to receive any pension from the Military Fund. It also appears that the amount of what she would be entitled otherwise to, is not now to be paid to the extent to which it would be payable at the time the marriage took place, the fund having failed to produce sufficient to keep up the payment. There has been a diminution in the annual payment to each annuitant. There is also another ground on which a deduction has been made by the regulations. According to the Register which was before the parties, there is a deduction for the amount received from Lord Clive’s Fund, by the regulations themselves; it is not so expressed—it is expressed the annuity is payable to widows of subscribers, in all cases to be subject to deduction equal to the amount of Lord Clive’s Fund. It appears by the regulations respecting what is called Lord Clive’s pension, if the husband leaves property to a certain amount, 3,000*l.*, the widow is not entitled to participate in the benefit of that fund; so that, in the case of this particular lady, she never received any benefit from Lord Clive’s Fund; but still, it appears, that the amount which she

would have been entitled to receive from Lord Clive's Fund is, according to the regulations of the Bombay Fund, deducted from what she would otherwise have been entitled to receive from that fund.

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My Lords, these three grounds of deduction are the points in question between the parties in this cause; she claiming against her husband's estate under the provisions of the marriage contract, which I shall presently state to have made good to her, an annual sum equal to 365*l.*, to which, according to the regulations of the Bombay Fund, she would have been entitled, if those grounds of deduction had not taken place.

My Lords, the first question is, whether having for the present, at least during second coverture, lost the benefit to arise from the pension from the Bombay Fund, she is entitled to come upon the husband's estate for the purpose of having that loss made good; secondly, whether the husband's estate is liable to make good the deficiency which has arisen in the amount of payment to which widows are now entitled out of the Bombay Fund; and, thirdly, whether she is entitled to have made good to her the amount of the deduction for Lord Clive's Fund, the benefit of which she has not received, he having died possessed of property more than 3,000*l.*

Now, my Lords, the contract itself provides for the several events in which the widow is entitled to claim against her husband's estate, in these words: " In contemplation of which marriage, the said John Taylor
" hereby binds and obliges himself, his heirs and
" successors, to do and perform all and whatever may
" be necessary and incumbent upon him as a subscriber
" to the Bombay Military Fund to secure to his pro-

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“mised wife, in the event of his predeceasing her, the
“benefit of the pension or annuity payable from the
“said fund to the widow of a subscriber, according to
“the rank he holds or shall hold in the Company's
“army for the time; and failing thereof, in case the
“said pension or annuity, from whatever cause, shall
“not be available to his promised wife, in the event
“aforesaid, saving and excepting only through her
“right to and possession of such separate funds as
“by the rules and regulations of the fund would exclude
“her from all benefit thereby, then the said John
“Taylor binds and obliges himself, his heirs and suc-
“cessors, to make payment to the said Agnes Forlong,
“his promised wife, in the event of her surviving him,
“of a clear yearly jointure or annuity equal to the
“pension that has hitherto been paid or shall be pay-
“able from the said fund to the widow of a subscriber
“holding the same rank in the army which now belongs
“or shall belong to the said John Taylor at the time of
“his death, and that at two specified times, and so on
“thereafter half-yearly during her life.”

Now, my Lords, it was before the parties, that the pension was to be received only during widowhood. Of that the parties were fully aware, because the regulations as contained in the East India Register so informed them, for they state in very distinct terms that widows shall be entitled to receive the following annuities:—
“widows during their widowhood, and not otherwise.”
It is contended, on the part of the husband's estate, that the charge upon the husband's estate is not to make good the loss which she has sustained by her second marriage. My Lords, the parties were of course competent to provide that, notwithstanding the second marriage, not-

withstanding the loss ensuing from that second marriage, she should be entitled to receive a corresponding annuity from her husband's estate during her life;—and the husband has so contracted. She was perfectly well aware that that which was to be lost was the pension during widowhood;—and that he contracted to supply. He has in terms said, she shall have the pension during life. He has contracted, that in whatever event which shall deprive his intended wife of the benefit of the annuity, excepting one cause, which is not the cause that has happened, he will pay an annuity to her for her life equal to the annuity which she would have received from the Bombay Fund.

My Lords, this really appears to me so perfectly free from all doubt, that the only difficulty I feel is, how to understand that any real question should be considered as resting upon this part of the case. I find that below it has been supposed there was a right to depart from the plain and obvious meaning of these terms, because the act which has caused the loss of the annuity from the Bombay Fund was the act of the wife herself; but if the parties have so contracted, there can be no reason why the contract should not be carried into effect; the parties—having before them the difference between the pension payable during widowhood and a payment during life—having thought fit to contract that if the one should fail from any cause, except a cause which is not now in question, it should be made good. It is unnecessary to bring home to the parties the knowledge of that which was likely to happen. It must be taken that they were contracting for that which might possibly happen; the fair inference, therefore, is that they were intending to be provided against the particular

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event which has happened. It is not necessary to go so far as that; it is quite sufficient if the terms of the contract are such as to carry to the widow the right to have made up to her that annuity which she lost by an event having happened which is provided against in the marriage contract, there being in that marriage contract an exception of one cause, and one cause only, which should prevent the husband's estate being liable, namely, the possession of property of a certain amount, so as to deprive her of the right on the Bombay Fund.

My Lords, upon this subject there appears to have been a difference of opinion among the Learned Judges below, ten of the Learned Judges being in favour of the right of the widow, and three against her right—because the act which deprived her of that annuity was her own act, that she could not claim it as against her husband's estate, and therefore, she was not entitled; but I do not see any reason to entertain any doubt of her right to have that loss compensated out of the husband's estate.

My Lords, the next point is, how far her husband's estate is liable to make up the loss which has arisen from the failure of the fund; that is, the partial failure of the fund, it appearing that the fund has not been equal to the keeping up the payments to the amount expected. There has been a deduction of a certain amount from the annuity which she seeks to have made up from the husband's estate.

My Lords, the language of the undertaking certainly is not so clear upon this point as it might have been; but still I submit, upon the point of the contract, there is quite sufficient, taking the whole of it together, to

come to a very satisfactory conclusion as to what were the intentions of the parties. The language is, “and failing thereof,”—that is, in case the husband shall not do that which was necessary to keep up his title to the pension, by annual payments—“and failing thereof, or in case the said pension or annuity, from whatever cause, shall not be available to his promised wife in the event foresaid, saving and excepting only through her right to and possession of such separate funds as by the rules and regulations of the said fund would exclude from all benefit thereby, then the said John Taylor binds and obliges himself, his heirs and successors, to make payment to the said Agness Forlong, his promised wife, in the event of her surviving him, of a clear yearly jointure or annuity equal to the pension that has hitherto been paid or shall be payable from the said Fund to the widow of a subscriber holding the same rank in the army which now belongs or shall belong to the said John Taylor at the time of his death, and that at two terms in the year, Whitsunday and Martinmas, by equal portions; beginning the first term’s payment of the said jointure or annuity at the first term of Martinmas or Whitsunday that may happen after the said John Taylor’s death, and so on thereafter half-yearly during her life.”

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Now, my Lords, stopping there for the present, though there is another part which throws light upon the meaning of the parties in this particular clause; it is an undertaking in case of the pension or annuity, from whatever cause, not being available to his promised wife. It is not disputed, indeed it is admitted throughout, that if the annuity had wholly failed, if the fund

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had so failed as to have produced nothing, then the event would have arisen in which the liability to make good would have attached to the husband's estate, because there the pension would have been unavailing; but it is said that these words refer to its being unavailing to the full extent, and cannot be construed to refer to its being unavailing only in part. My Lords, if the clause stood by itself, if there were no other words which would act in putting a construction upon it, I should not have thought that a reasonable construction, for though these words do not fully express the intention contended for on the part of the widow, yet, when we look to what the husband is to do in case the fund is unavailing, it clearly means that what is unavailing he undertakes to supply. Now what does he undertake to supply? He undertakes to supply, in case of the fund being unavailing, an annuity equal to the pension that has hitherto been paid or shall be payable from the said fund to the widow of a subscriber holding the same rank in the army which the said John Taylor then held or should hold at the time of his death for her life. When, therefore, you look to his undertaking—what he is to do, the deficiency he is to make good—it is but reasonable to consider the earlier part of the clause in which the word “un-
“ availing” occurs as intending to describe a failure, the amount and extent of which is by his contract to be supplied.

My Lords, it does not at all rest there; because, when we come to the other clause, by which he is to be exonerated in a certain event, that leaves no doubt whatever of the meaning of the parties: then it goes on, and describes the events, in which he is to be

relieved from the liability. It is of necessity, that in describing the events that are to relieve him from the liability, they must be events corresponding with those which are to impose an obligation. The clause in which it is declared what events shall relieve him from this liability is in these words:—"declaring that in " the event and so long as the said Agness Forlong " shall draw and receive from the said Military Fund " a pension or annuity equal to the pension that " has hitherto been paid or that shall be payable " therefrom to the widows of a subscriber holding the " same rank which now belongs or shall belong to " the said John Taylor at the time of his death, or " would have been entitled to draw and receive, " such pension and annuity, but for the possession of other property than the personal obligation " hereby undertaken by him, shall be suspended aye " and while she is provided as aforesaid from the said " Fund." In what event, then, is the estate of the husband to be exonerated from this obligation? So long as the widow receives an annuity equal to that which has hitherto been paid. But has she received an annuity equal to that which has hitherto been paid? She certainly has not; there has been a deduction from the amount. Can it be supposed, then, that—the party having imposed upon himself an obligation to supply the total loss of the annuity, if that should occur, and who, in that part of the deed which exonerates his estates, is relieved only in the event stated, namely, in case of her receiving a pension equal to that of an officer of his rank—his liability would be satisfied, unless she received a sum equal to that amount. It appears to me, that, taking these two clauses together, there

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cannot be a doubt that he, having provided this annuity, undertook that she should have the benefit of the full annuity; and that if she could not derive it from the Bombay Fund, from whatever cause, his estate should make up the loss, if there was a deficiency in the proceeds, or if there was a failure from any cause operating to deprive her from the benefit of that annuity.

My Lords, there is only one expression in the whole of this deed which it appears to me at all difficult to deal with; and I cannot by any construction put a very accurate meaning upon the words which are used,—I mean the words “or shall be payable from the said “Fund.” It is said that the meaning of that is, that so long as she received the annuity which had before that time been paid, or which should from time to time be payable,—that is, all the husband contracted she should receive,—and that event taking place, she receiving whatever was payable, his estate was to be exonerated from liability to make up the loss.

My Lords, it would be a most extraordinary provision, if that were the real intent of the parties, because, if the Fund was liable to be reduced, so long as any fraction of the annuity remained payable that would exonerate his estate. It cannot possibly be supposed that that was the meaning and intent of the parties; it would in fact defeat the whole object of the settlement. I shall presently advert to the argument used on the other side, by which it was contended that the assignees of the annuity became entitled. Unless that can be maintained, the object of the settlement obviously is, that she should receive the benefit of the annuity so long as she could receive it out of the Bombay Fund; but that at all events her husband

was to guarantee to her an annuity equal to the benefit she would be entitled to receive out of the Bombay Fund; and to consider his liability as reduced and diminished, according to the diminution of the annuity which would be payable from time to time, would obviously be a construction which would deprive her of the benefit to which she was entitled.

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Now, my Lords, there are two ways in which these words may receive a reasonable and rational construction, although neither of them, perhaps, is entirely and grammatically correct. The husband, at the time of the marriage, was a major; it would naturally be expected that the next step in rank might be attained by him; he provides, therefore, that his liability shall be to pay a sum equal to the pension which had hitherto been paid or shall in future be payable from the Fund to the widows of subscribers holding the same rank in the army which now belongs or shall belong to him, John Taylor, at the time of his death, —that is, that he will pay a sum equal to what has been paid to the widows of officers of the rank he then held; or looking to the future, and providing, therefore, in the future tense, to the amount of annuity which would be payable to the widow of an officer holding the rank which he might hold at the time of his death. The objection to that construction is, that the words are unnecessary; because the construction would be the same if the words were omitted, and that it would be a sum equal to the pension which had hitherto been paid to the widow of an officer holding the rank which he then held or which should belong to him at the time of his death; but it is no objection that the words are unnecessary, provided

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that which is intended to be expressed may be otherwise extracted from the sentence. Those particular words cannot vitiate the construction, supposing that appears to be the intention of the parties.

My Lords, another construction has been put upon these words, which would lead to the same conclusion, as far as the merits of the question are concerned; namely, that the parties contemplated not a reduction in the amount of the annuity payable, but a reduction in the amount of what would be actually paid; and that is not unnatural, because, though the annuity was a fixed sum, and although there is nothing whatever in the statement of the title to the annuity or pension which would show that they looked to any increase—nor is there any reason to suppose that the widow would be entitled to an increase of annuity, an annuity of a certain amount being purchased by certain annual payments—yet as this, like other funds, might be liable to reduction, and might not be sufficient to pay the full amount of the annuity, it is not at all unreasonable to suppose that the parties contemplated such an event, and that the husband, intending to guarantee to his wife a certain amount, intended to guard against the possible event of the funds not being sufficient to keep up the amount of the annuity which would be payable, inasmuch as he had contracted to secure to her a certain amount of annuity, and it was possible the whole of this might not be received from those who had the management of the Bombay Fund. That would put a natural construction, and not an unreasonable construction upon those words, that she shall receive a sum equal to the pension which shall be paid or shall be payable. These words would not

be necessary; still, although they were unnecessary, they would not alter the meaning; and the event has actually taken place which appears to have been supposed and contemplated by the parties, for there has been not a diminution of the annuity payable—there has been no deduction from the amount which the widow is entitled to receive—there does not appear to be any power to diminish that—it is the contract between those who subscribe and those who have the management of the Funds that, in consideration of certain annual payments, there shall be a certain annuity payable to the widow—but there seems to be a power, and necessity would impose it if there were no such power reserved, that if the Fund did not produce the income necessarily there would be a deduction made from the amount to be paid to the annuitants upon the Fund; and accordingly it has taken place, and in the very terms which are used in ordering that deduction the title to the annuity is preserved, for it is, that the Fund not being adequate, there shall be so much per cent. deducted; but the arrears, so deducted, are to be made good to the annuitant as soon as the funds are adequate for that purpose. Now, that fact very much diminishes the importance of the question which arises upon these words, because if we are to adopt the construction contended for on the part of those who represent the husband's estate the event contemplated has not arisen. There has not arisen a diminution in the annuity payable; there has been a reduction in the amount received, but there has not been a diminution in the annuity payable. What the husband has undertaken to do is, to make up a sum equal to that which

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has hitherto been paid to the officers of equal rank, or that which should be payable. Now, that which is payable is still the 365*l*.; it is not the less payable because it is found impossible to furnish an income sufficient to pay the annuities in full; the title of the annuitant to the 365*l*. still remains; so that even were the construction to prevail—which is not the natural construction, nor that which is necessary at all consistently with the fair meaning to be put upon these words—but even if that construction were to prevail—the event has not happened in which, according to the terms of the contract, the husband would be relieved from his obligation, because there has not been a diminution in the amount of the annuity payable, but only a reduction in the amount actually received. And therefore, my Lords, in any way of construing this contract, coupled with the facts which have taken place, it appears to me very clear that the husband intended to devote the annuity in the first instance as a provision to his wife, and that he intended to contract in all the events which might constitute a failure, except from one cause specified, which is not now in question, that his estate should make up to her an annuity which was of an ascertained amount, namely, 365*l*. My Lords, upon this point seven of the Learned Judges were in favour of the husband's estate, and six were of opinion in favour of the widow's claim.

My Lords, there is one other ground of question, which relates to Lord Clive's Fund, and upon that subject the case is left in considerable obscurity. It is one of the principal points in the cause;—and I can find no allusion to it in the opinion of any of the Learned Judges; they take no notice of it at all. It

has not been contended that she would have received that 91*l*, her husband having left more than 3,000*l*. It seems very clear that, her husband having left more than 3,000*l*, according to the regulations of Lord Clive's Fund she could not receive any thing from that fund. It appears also equally clear—I say so, though it is a matter in dispute between the parties—that though she could not receive any thing from Lord Clive's Fund, still a deduction of the amount of what she might otherwise have received from Lord Clive's Fund was properly made by those who administered the Bombay Fund. That is not in terms so expressed in the register; but is to be found in the regulations themselves. It will be then clearly seen what is the ground of that deduction. It is not that a deduction shall be made equal to the amount the widow shall receive from Lord Clive's Fund, which are the terms used in the register, but that the annuity ~~used~~ in all cases shall be subject to a deduction equal to the amount of Lord Clive's Pension. Now, Lord Clive's Pension is not paid, because the husband has property to a certain amount. The regulation of the Bombay Fund is, that there shall be a deduction equal to the amount of Lord Clive's Pension. The amount of Lord Clive's Pension would be 91*l*—not payable in this particular case, on account of the amount of property which the husband left. Now, there is nothing to explain that, in the opinions of the Learned Judges, which I can find; but it is not matter of dispute that she has been obliged to submit to that deduction from what she was entitled to. If it had not been for the failure of the Bombay Fund, she could not have received the full amount, without submitting to the

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deduction of 91*l*. Now, if that be so, and the contrary is not contended, it is a failure arising from the other part of the case; it is an event not arising from the excepted cause which has occasioned the pension to that extent not to be available to the wife. If, therefore, the right construction of the contract be, that the husband was to make good any failure in the amount of the annuity, from whatever cause, except that particular cause, certainly this is a particular circumstance which has caused a reduction in the amount of the annuity to be received, and, according to the construction, which appears to me to be the right construction of the case, his estate is bound to make good the loss.

My Lords, this construction and this result appear to me so very clear, that a case has been attempted to be made (probably because it was the only ground which held out any chance of success) by the Learned Counsel in support of the husband's estate; namely, that the whole of what was meant was an assignment to pay the jointure or provision afforded by the pension itself, with a covenant for title. In the outset of such an argument, it was rather unfortunate that the Learned Counsel were obliged to go to the end of the settlement to find the assignment of that which was to be secured to the wife, so that the instrument would be an instrument which covenanted for a title remaining unassigned, and not the property being made available for covenants. At the end, after all those provisions, there comes an assignment of the pension, which stands by itself.

My Lords, if the intention had been merely to give her the benefit of the pension, with a covenant for

title, nothing could, in the common and ordinary acceptation of the term, impeach the title, but the failure of making the payments. The obvious frame of such an instrument would be, to assign the pension, which was totally unnecessary, for that was the property of the wife. The husband would only have bound himself to make good those payments which would constitute the title of the wife; but instead of that the deed provides for many events, which have nothing to do with securing the title to the pension. If that had been the object, how can any one explain, instead of that provided by the Bombay Fund, namely, a payment during widowhood, the husband binding himself to pay an equivalent for life, providing against the various events which might cause a failure in the title of the widow, for instance, her marriage again, and various other circumstances which might cause a failure. He covenants against them all, though forming no part of the title to the annuity, according to the regulations under which it was payable; he covenants to make good the annuity in all events but one, going far beyond any undertaking or stipulation that could possibly be required of him if the object had been merely to secure the title to the annuity, and the whole object had been to give her the pension to which the regulations would entitle her, so to secure her merely against the event of her losing the benefit of that annuity by his failure in making good the payments. It was probably the best argument that could be used; at all events the bringing forward such an argument shows that the case was thoroughly sifted. When we look at the different arguments remaining,

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there is no difficulty in coming to a satisfactory conclusion.

Upon the whole, my Lords, I have no difficulty in advising your Lordships to put that construction upon this contract, which throws upon the husband's estate the liability to make good to this widow, now married to another person, such a sum out of his estate as would make good to her the various deficiencies which have successively arisen, creating a total failure, indeed; during the time the second marriage may continue.

That is consistent with the interlocutor of the Lord Ordinary; and what I shall propose, is, to vary the interlocutor which followed, and to restore the interlocutor of the Lord Ordinary, which will, I apprehend, effect the object of your Lordships, if you agree in the opinion I have expressed.

Sir William Follett.—Will your Lordship allow me to ask, whether the costs should not come out of the fund; it is a trust fund?

Mr. Webster.—I trust that your Lordship will not decide that in the absence of my counsel.

Lord Chancellor.—This is an appeal in which the interlocutor of the Court of Session is varied. There can be no costs given in such a case.

The House of Lords ordered and adjudged, That the said interlocutor of the 24th (signed the 25th) of November 1836, so far as complained of in the said original appeal, be and the same is hereby reversed: And it is further ordered and adjudged, That the said cross appeal be and the same is hereby dismissed this House; and that the said interlocutor of the Lord Ordinary of the 11th July 1835 therein complained of be and the same is hereby affirmed: And it

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is further ordered, That the said cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

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DEANS and DUNLOP — GEORGE WEBSTER, Solicitors.

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JOHN LESLIE, Appellant.—*Dr. Lushington.*THOMAS CURTIS, Respondent.—*Sir William Follett.*

Ship—Registry Acts.—A party residing in Edinburgh, who stood upon the register of a ship as sole owner, held (affirming the decision of the Court of Session) liable for furnishings made in London to the ship on the order of the master, although he alleged that the master was the only owner, and that he himself was merely a creditor of the master, and had acquired right to the vessel merely in security of debt.

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THE ship Nimrod belonged formerly to the port of Port Glasgow, and was the property of James M'Lean and others. On 12th June 1834 the whole shares in the Nimrod were transferred by bill of sale in favour of the appellant Leslie as sole owner.

This transfer was, on the 18th September, in terms of the registry acts, indorsed on the certificate of registry in the custom-house books of Port Glasgow.

The master of the vessel was Francis William Hepburn, the brother-in-law of the appellant. On the 22d the appellant appeared at the custom house of Leith, and made the following declaration: "I, John Leslie of Windsor Street, in the city of Edinburgh, gentleman, do declare that the ship or vessel Nimrod of Leith,

“ whereof Francis William Hepburn is at present master,
 “ being British built, having one deck, two masts; her
 “ length aloft is seventy-seven feet nine inches, her
 “ breadth at the broadest part above the main-wales
 “ twenty-two feet eight inches, her depth in the hold
 “ fourteen feet three inches, and admeasuring 174 and
 “ 37-94 tons, was built at Greenock, in the county of
 “ Renfrew, in the year 1824, as appears from a former
 “ certificate of registry granted at Port Glasgow the 10th
 “ day of June 1824, now delivered up and cancelled;
 “ and that I the said John Leslie am sole owner of
 “ the said vessel, and that no other person or persons
 “ whatsoever hath or have any right, title, interest,
 “ share, or property therein or thereto; and that I
 “ the said John Leslie am truly and bonâ fide a
 “ subject of Great Britain, and that I the said John
 “ Leslie have not taken the oath of allegiance to any
 “ foreign state whatever, and that no foreigner, di-
 “ rectly or indirectly, hath any share or part interest
 “ in the said ship or vessel.

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(Signed) “ JOHN LESLIE.”

Upon this declaration a new certificate of registry
 was granted to the Nimrod, bearing that that vessel
 now belonged to the port of Leith, that Hepburn was
 the master, and that the appellant was the owner to the
 extent of 64-64th shares.

At the time of the proceedings thus adopted in Scot-
 land, the Nimrod was lying in the port of London
 under the charge of Captain Hepburn, and was destined
 for a voyage to Australia with passengers and goods.

Between the 19th and 25th of September the
 respondent, who is a shipping butcher, made various

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furnishings to and on account of the vessel, to the amount of 42*l.* 10*s.* 0½*d.*

In the month of January 1835 the respondent and his mandatory raised an action before the admiral at Leith for payment of this account of furnishings; in defence against which the appellant pleaded that he held the vessel merely in security of a debt due to him by Hepburn, who was the true owner.

On the 29th of June 1835, the following interlocutor was pronounced:—

“ In respect of the admitted deed of vendition of
“ the Nimrod, and the subsequent indorsement proceeding thereon on the ship’s register at Port Glasgow, and in terms of the defender’s declaration at
“ the custom house, Leith, on taking a new certificate
“ of registry to the said vessel, and in terms of the
“ said certificate, Finds that the defender was, when
“ the furnishings in question were made to the master,
“ sole owner of the ship: Finds the defender liable
“ to the pursuer for the amount of the said furnishings;
“ repels the defences, and decerns against him in
“ terms of the libel: Finds expenses due; allows an
“ account thereof to be given in; remits the same, when
“ given in, to the auditor of Court to tax and report.

The appellant carried the cause to the Court of Session by advocacy; and on the 16th of February 1836, the Lord Ordinary pronounced the following interlocutor:—“ Finds it proved, in terms of the interlocutor
“ under review, that when the furnishings in question
“ were made to the master the advocator was sole owner
“ of the ship, and therefore liable to the respondent for
“ the amount of the said furnishings: Remits the same

“ simpliciter to the Admiral of Leith, and decerns:
 “ Finds the advocator liable in expenses, both in this
 “ and the inferior Court, and remits to the auditor to
 “ tax the account thereof, and to report.”

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To this interlocutor the Lords of the First Division adhered on the 23d June 1836.¹

Leslie appealed.

Appellant.—These interlocutors all proceed upon the ground that the appellant was the sole owner appearing on the face of the register, and that being so he was liable for the furnishings made by the respondent.

But, in reality, the appellant never was the owner; and it never was intended by any of the parties to the transaction that he should be the owner, and he never acted or was considered or relied on as the owner. The vessel was truly purchased by Hepburn for his own behoof and use, and the interposition of the defender was merely for the accommodation of Hepburn, to put him in funds to make the purchase; and the nominal title in the appellant was not intended to give him any farther interest than a mere security for his advances.

The appellant took no concern or interest in the management of the vessel. The real interest and management was all along in Hepburn, who acted for his own behoof in ordering the furnishings in question, and every thing else connected with the vessel, he having both the ostensible and the actual control, and the real interest. The appellant did not order the

¹ 14 D., B., & M. p. 994.

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furnishings, nor did he authorize Hepburn to order the furnishings; and he had no interest in the profits of the voyage or vessel.

The Judges in the Courts below have considered the circumstance of the formal title being in the appellant as excluding every other consideration whatever. But it is not correct to hold, that the legal title was in the appellant at the time of the furnishings, which commenced in London upon the 19th of September, and the title in the appellant was not completed at Leith until the 22d of that month; consequently, when the furnishings were ordered, and for some days after they had begun to be made, the legal title was not in the appellant, and some days farther must necessarily have elapsed before the knowledge of that title could have reached the respondent in London, if it ever reached him at all.

But even if the title in the appellant's name had been completed at the time when the furnishings commenced, that circumstance did not of itself create liability, or supersede the liability created by the orders of Hepburn, upon whose account, as well as by whose orders, the furnishings were made. The liability for stores and furnishings is governed by the like rules as other contracts, and depends upon the credit given at the time when the stores and furnishings were supplied; which credit is a question of fact, and does not result from the legal ownership.

Respondent.—A party cannot be allowed to contradict a solemn declaration publicly made, and it is therefore peculiarly incompetent to plead that there was any title to this vessel in the person of Hepburn, who never had

any title to her. The former owners were M'Lean and others, and from those parties the property passed at once to the appellant without any intermediate interest in Hepburn; and it is impossible, therefore, to say that Hepburn was ever the owner in any sense, and certainly not in reference to the registry statutes.

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Neither can the appellant plead that he had merely an interest in this vessel in security for debt, or as a mortgagee, as he was not a creditor or mortgagee of M'Lean and others, and there was no other owner of the vessel from whom he could acquire a mortgage right. He could not acquire a mortgage of the vessel from Hepburn, who was never an owner. But, indeed, under the terms of the Registry Act, 6 Geo. IV. c. 110., which was the statute in force at the date of these transactions, the terms of the appellant's right and title are exclusive of the plea that he was merely a mortgagee. By that act parties have the means of framing the transfer and registry expressly on the footing of a mortgage, where such is the nature of the transaction. If, therefore, a party does not avail himself of this power, but receives and records his title, not as a mortgagee, but as a purchaser or absolute owner, he must be held and dealt with as an owner accordingly.

It is of no importance that the respondent may have partly relied on Hepburn's credit, because for all such furnishings the shipmaster is personally responsible as well as his owners, and the respondent was entitled to look to both, and it is usual to charge both in the accounts for the purpose of that double liability. Even if the respondent had been ignorant of the individual owners, he would have been entitled to make the furnishings as he did on account of the owners

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generally, it being open to him afterwards to find out what parties were liable as owners.

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The House of Lords ordered and adjudged, That the said petition and appeal be and the same is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

G. BOCKETT — DUNN and DOBIE, Solicitors.

[18th May 1838.]

JAMES OCHTERLONY LOCKHART MURE, Esquire, of Livingston, and GEORGE M'CALLUM, W. S., his Mandatory, Appellants. — *Sir William Follett — Dr. Lushington.*

JAMES OCHTERLONY LOCKHART MURE, younger, of Livingston, and others, Respondents. — *Attorney General (Campbell) — Burge.*

Entail.—Held (affirming the judgment of the Court of Session), that although there was no exclusion of heirs portioners in an entail under which an heir male succeeded as the heir of the body of a nominatum substitute, the entail was effectual against him.

THE late Robert Mure, the great grandfather of the appellant, was possessed of two separate properties in the stewartry of Kirkcudbright,—Livingston, lying in the parish of Balmaghie, and Glenquicken, in the parish of Kirkmabreck. He had one son, Adam Mure, and two daughters, Jean and Margaret Mure. Upon the son, and the heirs male and female of his body successively, he settled both properties as one estate, excluding heirs portioners, and under all the fetters of a strict entail; but failing the son and his descendants, he separated the properties, giving Livingston to Jean, his eldest daughter, and the heirs of her body generally, without any exclusion of heirs portioners, and Glenquicken to the younger daughter, Margaret, and

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the heirs of her body, also without any exclusion of heirs portioners.

The deed then proceeds to reserve the granter's life-rent, and to provide that all the heirs of entail shall take the name of Mure as their proper surname, but without obliging them to assume any particular arms, and that they shall hold the lands by virtue of the deed of entail, and by no other title.

On the death of the granter he was succeeded in the whole lands by his son Adam Mure, the institute, who was base infeft upon the precept contained in the deed, and possessed upon that title until 1802, when he died leaving no issue. By that event the succession to the lands of Livingston, in the parish of Balmaghie, opened to Jean Mure, the appellant's grandmother, in terms of the destination in favour of her and the heirs of her body, and she proceeded to make up titles in the following manner:—Having expedite a general service, as nearest and lawful heir of taillie and provision of her deceased brother Adam Mure, and having thus carried right to the unexecuted procuratory of resignation in the deed of entail, in so far as regarded these lands, she thereupon obtained a crown charter of resignation in favour of herself and the heirs lawfully procreated or to be procreated of her body; whom all failing, to the nearest heirs and assignees whatsoever of Robert Mure, the entailer, under all the conditions and provisions of the deed; and upon the precept contained in this charter she was infeft, and her infeftment duly recorded. She then granted a precept of clare constat to herself as heir, in conformity with the terms of her general service to her brother; and having been infeft upon this precept she thereafter completed her title.

consolidating the property and superiority by resignation ad remanentiam in her own hands. Upon this title she continued to possess the estate of Livingston till her death in 1811; and the succession then devolved on the appellant as lawful son of the deceased James Lockhart, Esquire, who was the eldest son of Jean Mure; and he thereupon made up his title by infeftment upon a precept from Chancery, following on the retour of his special service as nearest and lawful heir of taillie and provision to his grandmother, Jean Mure.¹

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¹ With regard to Glenquicken, it may be mentioned that the succession to that estate opened, upon the death of Adam Mure in 1802 without issue, to Adam Thomson, the second son of Margaret Mure, she having deceased some time before. Adam Thomson was then long past the years of majority, and he immediately proceeded to make up titles to the lands by service and infeftment in common form. He thereafter assumed the name of Mure, and continued in possession until 1822, when he died without issue; and as he had been predeceased by his elder brother, who, on account of his imbecility, had been passed over in the original settlement, the estate of Glenquicken fell, in terms of the destination, to the heirs procreate or to be procreate of Margaret Mure. These were six in number,—all daughters, or descendants of daughters; namely, three surviving unmarried daughters; David M'Culloch of Torhouskie, son and representative of Margaret Mure's eldest daughter, deceased; and two other persons, who were single children of other two daughters, also deceased.

Among these parties a competition for the estate arose upon the death of Adam Thomson Mure. Mr. M'Culloch, conceiving that the exclusion of heirs portioners was an absolute and general exclusion applicable to the separate destinations, as well as to the undivided succession, took out a brieve for serving himself heir of taillie and provision to his uncle in the whole lands of Glenquicken, as being the son and representative of Margaret Mure's eldest daughter. The other parties also, conceiving that the exclusion did not so apply, took out a brieve for serving themselves, without any reference to the fetters of the entail, as heirs portioners of provision to Adam Thomson Mure in these lands. The question between them came finally to be tried in a mutual advocacy of brieves; and in the end, the Court decided in favour of the right of the heirs portioners to succeed, finding that they were "preferable, and entitled to be served heirs portioners of provision under the settlement of the said Robert Mure of Glenquicken," and to this judgment they adhered, upon a reclaiming petition and answers.

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The appellant, conceiving himself entitled to hold the lands of Livingston free from the fetters of the entail, raised an action against the heirs substitute for having it found that he had right to the lands in fee simple, on these two grounds :—1st, that the fetters were applied only to the united estates, and not to the estates when separated ; and, 2d, “ the said tailzie in favour of the
“ heirs lawfully procreate of the body of the said Jean
“ Muir, being a tailzie, upon heirs portioners, or not
“ excluding heirs portioners, and therefore implying
“ the division of the tailzied lands and estate, and consequent inefficacy of the said tailzie, is not a tailzie, as authorized by the said statute (1685), affectable or affected with irritant and resolute clauses, and whereby it shall not be lawful to the said heirs procreated of the body of the said Jean Muir to sell, analzie, or dispoise the said lands, or any part thereof, or contract debt, or do any other deed whereby the samen may be apprized, adjudged, or evicted from the other substitutes in the tailzie, or the succession frustrate or interrupted ; that the pursuer having succeeded and made up titles to the said lands and barony of Livingston, and others under the foresaid tailzie conceived in favour of the heirs procreated or to be procreate of the said Jean Muir’s body, which, as aforesaid, is not legally affectable or affected by the foresaid conditions, provisions, declarations, and clauses irritant and resolute, is consequently, as proprietor and in right of the said lands, barony, and others contained in the said disposition and deed of tailzie in fee simple, entitled to do, exercise, and perform every act and deed, faculty and power relative thereto, in the same manner in all

“ respects as if he were proprietor thereof in fee simple,
 “ or as if the said conditions and provisions, and clauses
 “ irritant and resolute, were not contained in the said
 “ disposition and deed of tailzie; or at least, he is en-
 “ titled to do, exercise, and perform such acts and
 “ deeds, faculties and powers, as the Lords of our coun-
 “ cil and session shall find to be competent to and in
 “ the power of the pursuer.” And he concluded
 accordingly.

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The Lord Ordinary, on the 12th November 1836,
 pronounced the following interlocutor:—

“ The Lord Ordinary having considered the revised
 “ cases for the parties, productions, and whole process,
 “ assolizies the defenders from the conclusions of the
 “ libel and decerns; finds no expenses due.

“ *Note.*—Anciently it was the law of Scotland, as it
 “ was of most of the other states of Europe which
 “ adopted the feudal system, that when all the heirs
 “ expressly called to the succession of lands in the
 “ grant or charter to the vassal had failed, the fee
 “ returned to the superior, or failing him and his
 “ heirs, to the crown. To prevent that rule from
 “ taking effect, a clause was early introduced in this
 “ country, as matter of style, by which all grants were
 “ made to terminate by a limitation to the heirs and
 “ assignees whatsoever, either of the grantee or of some
 “ other person suggested by him. After strict entails
 “ were authorized by statute, an attempt was made to
 “ convert this clause to a different purpose from that
 “ for which it was intended, the remoter heirs what-
 “ soever of the entailer maintaining that it imposed
 “ the fetters of the entail on the nearer heirs whatso-
 “ ever. But the attempt was successfully resisted, as

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“ the clause was plainly intended not to be a nomi-
 “ nation of heirs of entail under the restrictions of
 “ the deed, but merely to let in heirs general to the
 “ exclusion of the fisc. Among other arguments to
 “ prove this, it was observed, that if the clause in
 “ question had been intended to prolong the entail,
 “ heirs portioners would have been excluded, for it is
 “ inconsistent with the nature and object of an entail
 “ that the estate should be exposed to unlimited divi-
 “ sion, by which the representation of the family by
 “ an individual is destroyed.

“ But the present case is of a totally different nature.
 “ The clause which gives rise to this question is a
 “ distinct substitution, expressly confined to the heirs
 “ of the body, and followed by the clause of style to
 “ heirs whatsoever, which indicates that then, and not
 “ till then, it was the intention of the entailor that his
 “ entail should come to an end. The fetters, there-
 “ fore, must be effectual, unless, 1st, they are not
 “ imposed in apt and legal terms; or, 2dly, unless
 “ they are applied to persons incapable of being so
 “ fettered. No objection is made to the terms in
 “ which the prohibitory, irritant, and resolute clauses
 “ are expressed; they are framed in the usual and
 “ appropriate style. But there are two classes of sub-
 “ stitutes called in this clause,—heirs male of the body,
 “ on whom the fetters may be imposed, and heirs
 “ portioners of the body, on whom they cannot be
 “ imposed; for, as has just been observed, it is incon-
 “ sistent with the nature of a strictly entailed fee that
 “ it should be vested in heirs portioners. The con-
 “ clusion, therefore, is, that as long as the first class of
 “ substitutes, that is, heirs male of the body, remains

“ unexhausted, the tailzie is good, and as soon as the
 “ succession opens to heirs female of the body, heirs
 “ portioners not being excluded, the estate becomes
 “ a fee simple.

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“ The ingenious argument of the pursuer rests upon
 “ the obvious fallacy of confounding the last limitation
 “ or clause of style, to which a special rule applies,
 “ with a preceding substitution, to which effect must
 “ be given according to the ordinary principles of
 “ entail law. In the clause of style, heirs, whether
 “ male or female, are not fettered, because it was not
 “ intended to fetter either the one or the other. In
 “ the prior substitution heirs female are not fettered,
 “ whatever the intention may have been, because in
 “ the character of heirs portioners they cannot be
 “ fettered. The precedents on which the pursuer relies
 “ do not touch the question. In the cases of Cassels
 “ and Leslie the action was brought to enforce the
 “ entail against the last substitute by parties called
 “ merely under the clause of style. Thus also in the
 “ case of Watt; by the failure of Robert Watt, and
 “ the heirs male of his body, the substitution to his
 “ heirs and assignees whatsoever, that is, to these
 “ called by the common clause of style, opened; and
 “ it was in the character of heirs under that clause
 “ exclusively that the defenders in that case attempted
 “ to enforce the tailzie against Henry. In the present
 “ case the defender, James Ochterloney Mure younger,
 “ is called by an express substitution, and not by the
 “ clause inserted to exclude the fisc. He is capable
 “ of being fettered, and may be succeeded by a series
 “ of heirs male with the same capability.

“ It is thought unnecessary to take notice of the

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“ pursuer’s argument, that the entailor did not mean
“ to continue the fetters after the succession divided.
“ The words are too express to admit of that construc-
“ tion, and more particularly the clause with regard
“ to bearing the name of the entailor.

“ No expenses have been found due, because this
“ appears to be the first case which the precise ques-
“ tion at issue has been tried; and it is a family suit,
“ rendered necessary from the inaccurate style in
“ which the settlement has been framed.”

To this interlocutor the First Division of the Court
adhered, on the 16th of February 1837.

Mure appealed.

Appellant.—¹ The substitution under which the ap-
pellant is called is not a substitution which is capable
of being brought under fetters at all, inasmuch as it is
to “ the heirs of Jean Muir’s body ” generally, without
any exclusion of heirs portioners, or any departure
from the order of law.

Every entail is, in its essential character, a deed
whereby the legal course of succession is cut off, and
an arbitrary one substituted in its place. For an entail
is not created by the mere imposition of fetters and
restrictions, these being only the machinery or the
accessory helps employed in order to constitute a valid
entail under the provisions of the statute. They have
been found, in the course of legal experience, necessary

¹ An argument was maintained that the fetters did not apply to the
estates in their divided form; but as it was founded on special clauses, and
not much relied on, it is not reported.

for securing the grantor's purpose of transmitting his estate unimpaired to the series of heirs whom he has favoured; but the entail itself, as the term clearly denotes, and as is further proved by the definitions given of it by all the institutional writers, is nothing more than a destination to others than the heirs at law.

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All the authorities, whether before or after the statute 1685, concur in representing a certain departure from the legal course of succession as an essential element in the idea of an entail. And though, no doubt, the statute itself takes no notice of this characteristic of the deed, but simply declares "that it shall be lawful to his Majesty's subjects to tailzie their lands and estates, and to substitute heirs in their tailzie, with such provisions and conditions as they shall think fit," yet an entail at common law is a deed altering or cutting off, in some part, the legal course of succession; and a statutory entail is just the same deed, aided in its operation by the assistance of irritant and resolute clauses for the enforcement of the prohibitions.

But while there is nothing to prevent the making of an effectual entail upon the "heirs of a man's body," in their order, by providing a constant exclusion of heirs portioners throughout the whole course of succession, it is obvious that without such exclusion there can be no entail: first, because there is no departure from the ordinary course of law; and, secondly, because the admission of heirs portioners, by exposing the estate to unlimited division, is altogether inconsistent with the notion of a settlement of this description. Whatever other deviation, therefore, an entailer may choose to make from the line of legal succession, this is one which is indispensable in order to give his deed the character of an

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entail, if his destination be taken to "heirs of the body." Supposing a party were to destine his estate, under the fetters of an entail, to his eldest son, and the heirs of his body generally, whom failing, to his second son, and the heirs of his body, and so on to all the members of his family in their order, with a like general substitution to their descendants respectively, and the whole destination terminating with the usual clause, "to the granter's own nearest heirs whomsoever,"—there can be no doubt that a court of law, if called upon to judge of the validity of such a deed, would hold it to be altogether inoperative as an entail,—even in the person of the party first succeeding, though that might happen to be the eldest son, or any other heir male; both because it is not, in form, a tailzeing or cutting off of the legal course of succession, and because, in effect, it exposes the purposes of the entailer to immediate frustration. The same consequences would, of course, attach to a destination to "heirs of line," or to "heirs at law" generally, or to any other class of heirs so comprehensive as to admit heirs female to the succession. But if this be true in the general case of a whole destination conceived in favour of heirs at law in their order, it must be equally true when the question arises, as it does here, with regard to any particular branch of the destination which is conceived in the same general terms.

It is an established rule of law that an entailed estate becomes a fee simple in the person of the last substitute, failing whom, it is provided to devolve upon heirs whomsoever; the chief, if not the only reason of the rule so laid down being, that that class of heirs includes heirs portioners, by whose admission the estate would be exposed to division. Nor is it necessary, in order to

give place for the operation of the rule, that the succession shall, de facto, have opened to heirs portioners; but it is enough that that part of the destination has been arrived at, which admits of the possibility of their succeeding, and the last proper substitute has it in his power to bring a declarator for ascertaining his own freedom from the fetters, even though he should see that the first of the heirs whomsoever is a male or a single female, in whose person the estate would be preserved entire.

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Among "heirs whomsoever," it is manifest there is no more immediate risk of the succession of heirs portioners than there is among "heirs of the body," the contingency being just as likely to happen in the one case as in the other; and as, in a substitution to "heirs whomsoever," the actual succession of heirs portioners is never waited for in order to render the entail inoperative, so neither ought the occurrence of that event to be waited for in the case of a substitution to "heirs of the body," which admits the same danger in precisely the same degree. It is, therefore, no answer to the appellant's claim for exemption from the fetters, to say that he is a male heir, and that there is a prospect of his being succeeded by other males, or by single heirs female without the intervention of heirs portioners, since that is an objection which might, with equal force, be urged against the claim of the last substitute, or even of the heir whomsoever, in every case where heirs portioners were not actually in existence. Here, indeed, the appellant is not in the situation of last substitute, failing whom, the estate is to go to a class of heirs among whom heirs portioners are included, but he is in a condition even more favourable than that for having

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his freedom from the fetters declared, for he is already in the substitution by which heirs portioners are as directly called as he himself is. Under the general substitution to the "heirs of Jean Mure's body," he has succeeded simply because he was her nearest heir in the line of descent, and not at all because he chanced to be a male.

Respondents.—In the present case the question does not relate to a substitution to Jean Mure and her heirs and assignees whatsoever, and still less to a last substitution in an entail to the nearest heirs and assignees of the entailer. It is a special destination to Jean Mure, and the heirs procreated or to be procreated of her body. It is thus a destination to her, and the heirs of her body in their legal order; and it calls them all in that order just as effectually as if it had been broken down into separate classes. Although it is true that a last substitution to the heirs and assignees of the granter operates as an extinction of the entail, yet it bears no similarity to a special destination to a particular individual and the heirs of his body. In the one case it is irreconcilable with the clauses of an entail, and can only receive effect by holding that the entail is at an end. But the other is an ordinary substitution, by which a particular class of heirs is introduced, though under a very general form of expression; such heirs, however, being always under the fetters of the entail as much as any of the other who are called to the succession under a more restricted clause of destination. The respondents, as the son and daughter of their father, are, in their order, equally called to the succession under this general form of substitution as the appellant. They are two of the

heirs of the body of Jean Mure, to whom, in their order, the estate of Livingston has been conveyed. It was for the preservation of the estate to them, and to those who may succeed them as heirs of their bodies, that the fetters were imposed. They have a *jus crediti* that entitles them to insist on the enforcement of the fetters. Hence, the appellant can never maintain that the entail is at an end in his person, because, as coming after him, and having an interest to enforce the conditions of the entail, the respondents have a right to require that the estate shall be transmitted to them without dilapidation.

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The accidental circumstance of the entail admitting of being defeated on a certain contingency can never render the deed void before that contingency has occurred.

LORD CHANCELLOR.—My Lords, the question in this case arose in an action of declarator, the appellant, the father, seeking to have it declared against the defender, his son, that he was entitled to hold certain estates free from the fetters of a deed of tailzie of 30th June 1757. The owner of the estate had one son and two daughters. The limitations were to his son Adam and the heirs male of his body; whom failing, to the heirs female of his body and the heirs male of their bodies, the eldest heir female always succeeding without division, and excluding heirs portioners; whom failing, as to part of the estate, in favour of his daughter Jean and the heirs of her body; whom all failing, to his own nearest heirs and assigns whatsoever; and as to the other part of the estate, to and in favour of his other daughter Mar-

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garet, until Adam, her second son, attained twenty-one, and then to him and the heirs of his body; whom failing, to the heirs of the body of Margaret; whom all failing, to his own nearest heirs and assigns whatsoever.

Adam, the settlor's son, died in 1802; whereupon Jean possessed the portion of the estate settled upon her; and she died in 1811. She had a son, who died in her lifetime leaving a son, the pursuer; and the principal defender is the son of that son. The pursuer contends that he is entitled to hold the estate discharged of the fetters upon two grounds: First, that the fetters were not, by the provisions of the deed, imposed upon those who might be called to the succession after the failure of the descendants of the body of Adam the son, it not being disputed that they are in due form imposed upon Adam and the heirs male and female of his body; that is, that upon the true construction of the deed of tailzie the intention to impose them upon the daughters and their issue is not to be inferred, or is not sufficiently expressed: Secondly, that if it be held that such intention is sufficiently expressed, then it must fail by operation of law, because, as the limitation is to the heirs of the body of Jean, without any restriction to the eldest heir female, without division, the succession might open to heirs portioners, as to whom the fetters cannot apply, and that they are therefore inoperative as to all claiming under the destination.

The Lord Ordinary decided against this claim of the pursuer, which was adhered to by the Judges of the Inner House, and I concur in that decision, upon both grounds. The first point does not appear to have been much relied upon or to have been

thought of much weight below. It is not disputed that the daughters and their descendants are included in the clause respecting the name. In that clause the settlor speaks of Adam Mure and the whole heirs of tailzie descending of him. He then speaks of the heirs descending of the bodies of his daughters and the other heirs of tailzie, and then speaks of the heirs of tailzie above mentioned. From this it is clear he described the descendants of his daughters as heirs of tailzie, a term most properly applicable to them. If, therefore, in the other clauses he speaks of heirs of tailzie, he uses a term correctly describing the descendants of the daughters, and in which it is shown that he included them ; but in the other clauses the terms used are, "the whole heirs of tailzie above mentioned,"—"any of the heirs of tailzie above mentioned,"—"any others of the heirs of tailzie foresaid." So far, then, it would be impossible to raise a doubt of the intention to include the descendants of the daughters in those clauses.

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But it is said that some of the provisions are not applicable to the state of the property after the division between the families of the daughters, as to the estate of the heirs portioners who might be called to the succession. And to show the strictness with which clauses enforcing fetters are construed, those cases were referred to in which it has been decided that the institute cannot be bound under the description of heir of tailzie, and that other parts of the deed cannot be resorted to for the purpose of showing that the settlor intended to include him under that description. Those cases appear to me to be essentially different from the present. In those cases the terms used do not properly

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describe the institute; and if he were to be bound, he would be so under terms not applicable to him, for inferences are drawn from other parts of the deed that the settlor intended to include him. This inference the strict rules of construing such deeds forbid; but in this case the most appropriate description is used, and the attempt is, from other parts of the deed, to raise a construction contrary to the obvious meaning of the words used, and thereby to lead to a conclusion that the settlor did not intend to include the descendants of the daughter in the clauses, although he has used words which in terms include them. But do the provisions relied upon raise any doubt as to the intention to include the descendants of the daughters in those clauses? I think not. Certainly, terms might have been used more appropriate to the situation of the parties, and to the state of the property, after failure of the descendants of the son Adam; but in all attempts in one sentence to provide for a variety of events and a different position of parties, there is great probability that the expression will not be found correctly to apply to all the circumstances which may arise. I do not, however, find any such inconsistency in any of the provisions, or any such inapplicability to the state of things, after the division of the property between the families of the daughters, as to raise a doubt in my mind of the settlor's intention to include the descendants of the daughters in those clauses. I find, therefore, apt terms used to include them, and no sufficient inference, arising from other parts of the deed, that it was not the settlor's intention that they should be so included.

The question remains, whether, though included in

these clauses, they can be bound by the provisions of them? That is, are the clauses, and the fetters intended to be imposed by them, inoperative against heirs of tailzie who might have been bound, because the denomination includes a description of them, namely, heirs portioners, who, if called to the succession, would not be so bound?

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In support of this proposition no authority has been cited which appears to me at all applicablé. The case of the Earl of March v. Sir Thomas Kennedy, the passage from the third book of Erskine, tome 8, section 32, the cases of Leslie v. Dick, Morrison 15,358, and Henry v. Watt, Shaw and Dunlop, were quoted; but those authorities only prove that the ultimate limitation to heirs, or heirs and assigns whatsoever, is not considered as part of the entail; and that those who claim under such ultimate limitation, therefore, are not entitled to enforce the fetters of the entail against the last heir of tailzie; who, consequently, is entitled to hold the estate, as against them, discharged of the fetters. And those decisions furnish authorities very inconsistent with the doctrine contended for. They assume that the entail to any denomination of heirs may be good as to all others, although the fetters may become inoperative as to some one of the denomination, if he should prove to be the last of the entail. Why, then, is the entail in the present case to be bad as to all the denomination of heirs? Because, possibly, some of the denomination, namely, heirs portioners, may be called to the succession who would hold the lands discharged from the fetters.

In the passage from Erskine, the possibility of heirs portioners becoming entitled under the general de-

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scription of heirs whatsoever, is used only in an argument to prove that there was no intention to include such heirs in the entail; but that cannot apply where the denomination in which they may possibly be found is expressly included in it.

In the absence, therefore, of all authority in support of the doctrine contended for, and with so much of principle and analogy against it, I cannot hesitate to concur in the decision that the Court of Session have come to in holding, that as between the parties litigant the provisions and restrictions of the deed of tailzie are subsisting and in force. I do not, however, think that this is a case in which the appeal should be dismissed with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors and note therein complained of be and the same are hereby affirmed.

A. M'CRAE—HAY and LAW, Solicitors.

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JAMES SHEPHERD, Esq., Appellant.—*Attorney General*
(*Campbell*)—*Robertson*.

ROBERT GRANT, Esq., Respondent.—*Sir William*
Follett.

Entail — Succession — Clause.—An entailor destined his estate to the “eldest son” of his first, second, and third daughters *seriatim*; then to the “second son” of each *seriatim*; and then to the “heirs male” of his “first, second, and third daughters in the same order of succession:”—Held (affirming the judgment of the Court of Session) that after the first and second sons of the three daughters had failed the heir male of the eldest daughter, though he was the fourth son, took before the heir male of the second daughter, posterior to her second son.

ON the 13th November 1761, Mr. John Leith of Blair executed a disposition and deed of taillie of the estate of Blair in Aberdeenshire, of which he was proprietor. At this period Mr. Blair had no sons, but he had three daughters, viz. Anna Leith, the eldest, married before the date of the deed to John Grant younger, of Rothmaise; Janet, married also before the date of the deed to the Rev. Thomas Shepherd, minister of Bourty; and Margaret, the third, who at the date of the deed was unmarried, but was afterwards married to Mr. Charles Grant of Tombrakeachie, afterwards of Deskie. Before the date of the deed Anna,

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the eldest daughter, had five sons, viz. John, James, Alexander, Robert, and Peter.

Janet, the second daughter, had, at the date of the deed, four sons, viz. John, Alexander, Robert, and Thomas.

The deed was in these terms :—" Forasmuch as I
" have taken into my serious consideration, that I have
" no heirs male of my own body to represent me and
" succeed to my lands and estate, and that I have
" grandchildren, and am desirous that my memory and
" surname of Leith should be preserved in the persons
" of my grandchildren and their heirs ; therefore, and
" for certain other onerous causes and weighty con-
" siderations moving me, wit ye me, the said John
" Leith, to have sold, alienated, and dispoed, likeas I,
" by the tenor hereof, from me, my heirs, assignees,
" and successors, sell, annallie, and dispoene to and in
" favour of myself in life-rent, and to the heirs male
" lawfully to be procreate of my own body in fee ;
" whom failing, to the eldest son living at the time of
" my decease, procreate betwixt John Grant younger of
" Rothmaise and Anna Leith my eldest daughter, and
" to the heirs male of his body, in fee ; whom failing, to
" the eldest son of Thomas Shepherd, minister of
" Bourty, procreate betwixt him and Janet Leith my
" second daughter, and the heirs male of his body, in
" fee ; whom failing, to the eldest son lawfully to be
" procreate of Margaret Leith my third daughter, and
" the heirs male of his body, in fee ; whom failing, to
" the second son procreate betwixt the said John Grant
" and the said Anna Leith my eldest daughter, and
" the heirs male of his body, in fee ; whom failing, to
" the second son of the said Thomas Shepherd, pro-

“ create betwixt him and Janet Leith my second
 “ daughter, and the heirs male of his body; whom fail-
 “ ing, to the second son lawfully to be procreate of the
 “ body of Margaret Leith my third daughter, and the
 “ heirs male of his body, in fee; whom failing, to the
 “ heirs male of my said first, second, and third daugh-
 “ ters, in the same order of succession: All whom
 “ failing, to me, my nearest heirs and assignees whom-
 “ soever: But with and under the express provisions,
 “ restrictions, reservations, clauses irritant, and others
 “ after mentioned, all and hail the town and lands of
 “ Nether Blair,” &c., as therein described.

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He then granted procuratory for resigning the
 lands for new infestment of the same, to be made,
 “ given, and granted to me, the said John Leith, in
 “ life-rent, and to the heirs male lawfully to be procreat
 “ of my body in fee; whom failing, to and in favours
 “ of the said eldest son procreat betwixt the said John
 “ Grant and the said Anna Leith my eldest daughter,
 “ and the heirs male of his body, in fee; whom failing,
 “ to the eldest son of Thomas Shepherd, minister at
 “ Bourtry, procreat betwixt him and Janet Leith my
 “ second daughter, and the heirs male of his body, in
 “ fee; whom failing, to the eldest son lawfully to be
 “ procreat of Margaret Leith my third daughter, and
 “ the heirs male of his body, in fee; whom failing, to
 “ the second son procreat betwixt the said John Grant
 “ and the said Anna Leith my eldest daughter, and
 “ the heirs male of his body, in fee; whom failing, to
 “ the second son of the said Thomas Shepherd, pro-
 “ creat betwixt him and the said Janet Leith my
 “ second daughter, and the heirs male of his body;
 “ whom failing, to the second lawful son lawfully to

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“ be procreat of the body of Margaret Leith my third
 “ daughter, and the heirs of his body, in fee; whom
 “ failing, to the heirs male of my said first, second,
 “ and third daughters, in the same order of succession:
 “ All whom failing, to me, my nearest heirs and
 “ assignees whatsoever without division: But with
 “ and under the express provisions, reservations,
 “ clauses irritant, and conditions after mentioned;
 “ viz., that the heirs of tailzie who shall succeed to the
 “ said lands and estate shall be obliged to assume the
 “ surname of Leith simply, and no other; and in case
 “ any of the said heirs male shall happen to contravene
 “ the provision above written, they shall amit and lose
 “ all right of succession to the said lands, and the
 “ same shall devolve, accresce, and belong to the next
 “ heir of tailzie appointed to succeed, who shall fulfil
 “ and observe the condition aforesaid, and that without
 “ necessity of any declarator to be used for that pur-
 “ pose; and with and under this restriction and
 “ limitation, that it shall not be in the power of the
 “ said eldest son of the said John Grant, or any of the
 “ said heirs, whether male general or of tailzie, to
 “ alter, innovate, or change this present tailzie and
 “ nomination and order of succession before prescribed,
 “ or to do or grant any deed or act that may import
 “ or infer any alteration directly or indirectly.” The
 deed then contained an exception for the case of an ap-
 parent heir or after-substitute being by law incapable of
 succeeding by forfeiture, or attainder, or legal incapa-
 city:—“ And with and under this restriction and limita-
 “ tion also, that it shall not be in the power of the said
 “ John Grant, my grandson, or any of the heirs of
 “ tailzie, to sell, alienate, impignorate, or dispo

“ lands and estate aforesaid, or any part thereof, either
 “ irredeemably or under reversion, or to burden the
 “ same in whole or in part with debts or sums of
 “ money, infestments of annual rent, or any other
 “ servitude whatever, excepting only as is herein-after
 “ expressed.” “ With and under this irritancy, that in
 “ case the said John Grant, his said eldest son, or any
 “ of the heirs of tailzie succeeding to my estate, shall
 “ commit the crime of treason, and shall be thereof
 “ lawfully convicted or attainted, the said heir so
 “ convicted or attainted shall irritate all right and title
 “ to my said lands, and the same shall descend and
 “ devolve to the next heir of tailzie in the same manner
 “ as if the heir attainted or convicted as aforesaid had
 “ been naturally dead at the time of committing said
 “ treason.” He then reserved his life-rent, with power
 to him “ to sell, burden, or affect the said lands with
 “ any sum or sums of money, or exchange the same
 “ with other lands, as I shall think fit, and also to set
 “ the same in tacks, long or short.”

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The next clause bears, that “ sicklike the said eldest
 “ son of the said John Grant, and the other heirs and
 “ members of tailzie above mentioned, are hereby
 “ burdened with all my just and lawful debts that shall
 “ be resting by me at the time of my decease to what-
 “ soever person or persons; and likewise with the
 “ payment of 4,000 merks to each of the eldest and
 “ second sons lawfully procreate or to be procreate of
 “ the body of the said Janet Leith, my second daugh-
 “ ter, at their majority or perfect age of twenty-one
 “ years complete, with faillie and annual rent there-
 “ after during the notpayment of the same; as also
 “ with the payment of the like sum of 4,000 merks to

SHEPHERD “ the eldest son procreate or to be procreate of the
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 GRANT. “ body of the said Margaret Leith my third daughter,
 28th May 1838. “ at his majority or perfect age of twenty-one years
 “ complete, with faillie and annual rent thereafter
 “ during the notpayment thereof, but with this express
 “ provision, that the said sons of my said second and
 “ third daughters shall be obliged to assume the name
 “ of Leith, or otherwise to lose the benefit of the sums
 “ of money above specified, provided to be paid to
 “ them in manner foressed: And sicklike, my said
 “ heir of tailzie, and the other members of tailzie above
 “ expressed, are hereby expressly burdened with the
 “ payment of 3,000 merks Scots to the said Margaret
 “ Leith my third daughter, within year and day after
 “ she is married, with the annual rent of the said
 “ 3,000 merks yearly after my decease aye and until
 “ she is married, and in time coming aye and until
 “ payment.”

After certain other provisions, there is a clause declaring, that “ sicklike my heirs of tailzie are hereby
 “ burdened with the payment of any farther sum or
 “ sums of money I shall think proper to give either to
 “ my daughters or grandchildren or my natural
 “ children more than is provided to them by any
 “ write under my hand at any time either in liege
 “ poustie or upon death-bed;” and another clause,
 which provides that it shall not “ be in the power of
 “ any of the forenamed heirs of tailzie to burden the
 “ said lands above the sum of 4,000 merks, nor shall
 “ the eldest son be obliged to pay any more of his
 “ father’s debts after his death; and in case the said
 “ eldest son of the said John Grant, or any of the heirs
 “ of tailzie above mentioned, shall suffer the said lands

“ or any part thereof to be adjudged for payment of
 “ any of their debts or sums of money due by them,
 “ without purging the said adjudication within the legal
 “ term, before the expiry thereof, the said heir shall
 “ lose his right of succession and all benefit accrescing
 “ to him by virtue of this disposition, and that it shall
 “ be lawful to the next succeeding heir of tailzie to
 “ enter and possess the lands and others above dis-
 “ posed without any process of declarator, and the
 “ contravener and the heirs of his body shall amit and
 “ lose the right and benefit of their succession by
 “ virtue of these presents.” There is then a clause
 constituting and ordaining “ the said John Grant,
 “ his said eldest son, and the other heirs of tailzie
 “ above expressed, my cessioners” to the writs and
 evidents, maills and duties, &c., “ with full power
 “ to the said John Grant, his said eldest son, and the
 “ other heirs of tailzie,” to pursue for and recover or
 compound the said maills and duties, as therein speci-
 fied. Lastly, follows a precept of sasine, directing that
 sasine should be given “ unto me, the said John Leith,
 “ in life-rent, and to the heir male lawfully to be pro-
 “ create of my own body in fee; whom failing, to
 “ the said John Grant, his said eldest son, and the
 “ heirs male procreate of his body, in fee; which
 “ failing, to the other heirs of tailzie above specified.”

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On the same day on which this deed was executed
 the granter made a testament, whereby he appointed
 Alexander Leith of Freefield to be his executor for
 payment, first, of his funeral expenses and debts, and
 then “ to apply the remainder of the sums of money
 “ due to me for payment of the several sums destinate
 “ and appointed by me to be paid to my grand-

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“ children, particularly mentioned in my disposition
“ of taillie, of the date of these presents, to be paid to
“ them upon the conditions and provisions mentioned
“ in the said disposition allenary and no otherways.”
He granted certain other legacies, and, inter alia,
one to Margaret Leith his third daughter, and Janet
Leith his second daughter, and also a legacy to his
whole daughters equally, of his furniture, &c., except
“ my own press, in which my papers are kept, which
“ is to belong to my heir of tailzie who shall succeed
“ to me in my estate.”

On 31st August 1763 Mr. Leith executed another
deed, containing additional provisions in favour of his
daughters. This deed, after narrating his love and affec-
tion to Jane and Margaret, “ his second and youngest
“ lawful daughters, and for their more comfortable sub-
“ sistence,” proceeded thus: “ and to prevent all con-
“ troversies or disputes that may happen to arise, after
“ my decease, betwixt them and Anna Leith my
“ eldest lawful daughter, spouse to John Grant of
“ Rothmaise, to whom the life-rent right of my estate
“ of Blairs and Kingoodie is provided, as hereafter
“ mentioned (the fee of the same being some time ago
“ made over to John Grant her eldest lawful son by
“ disposition granted by me in his favour), and being
“ resolved to make use of the powers and faculty
“ reserved to me by the said disposition or other
“ settlements made by me heretofore of my said estate
“ and others, my means and effects,”—therefore,
he conveyed all his moveable estate and effects which
might belong to him at his death, to Janet, her heirs,
executors, and assignees, and to Margaret, her heirs
and assignees, as after mentioned, equally between

them, under the conditions and provisions therein set forth. Farther, proceeding on the narrative that, by the “aforesaid disposition and settlement of my said
 “lands and estate of Blair and Kingoodie, granted by
 “me some time ago, as said is, in favour of the said
 “John Grant, eldest lawful son procreate betwixt the
 “said Anna Leith my eldest daughter and the said
 “John Grant of Rothmaise her husband, and to the
 “other heirs of taillie therein mentioned, whereby
 “they were and are hereby likewise obliged to assume
 “and take upon themselves the name of Leith, I had
 “intended, but forgot and neglected, to provide her
 “the said Anna Leith in the life-rent of the said estate;
 “therefore, to supply the said defect (in virtue of the
 “powers and faculties thereby reserved to me), and to
 “make my intention now known, I hereby assign and
 “transfer from me and my heirs and successors, to
 “and in favour of the said Anna Leith, with the
 “burden of a tack granted by me of this date in
 “favour of the said Margaret Leith my youngest
 “daughter, of the croft presently possessed by me for
 “the space of eleven years from and after my decease
 “for the yearly payment of the rent therein men-
 “tioned,—the whole rents, maills, farms, duties, kains,
 “customs, and casualties of the said lands and estate
 “of Blair and Kingoodie, with the tacks whereby they
 “or any part of them are constituted, and that yearly
 “and each year during all the days of her natural life,
 “hereby secluding the said John Grant her son, or
 “others my heirs of tailzie, or nearest heirs whatso-
 “ever, from having any share or right thereto, or
 “troubling and molesting her therein during the said
 “time.”

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Again, he introduced a clause in these terms:—

“ Lastly, as it is my intention that what sum the said
“ Margaret Leith’s half of the sundry goods, gear,
“ debts, and sums of money, moveable and immoveable,
“ and other effects hereby disposed and assigned in
“ her and the said Janet Leith’s favour, shall amount
“ to in the whole should be secured upon my estate of
“ Blair and Kingoodie; therefore, I hereby order
“ and require the before-mentioned John Grant my
“ heir, or others my heirs succeeding to him therein,
“ with consent of his or their tutors and curators, in
“ case of not being major, to take up and receive from
“ the said Margaret Leith what sum or sums she shall
“ please from time to time to give, and to grant a
“ sufficient security, either heritable or moveable, as
“ she shall require for the same, bearing interest at
“ five per cent., and penalty in case of faillie, the
“ interest to be paid to her yearly, &c., and the prin-
“ cipal sum or sums not to be given up or thrown in
“ her hands without her own consent, but to be a
“ lasting security to her during her own pleasure,” &c.,
as more particularly specified in the deed. And it is
added, “ the said lands and estate of Blair and
“ Kingoodie shall and may be chargeable therewith,
“ any thing contained in the disposition granted by
“ me of the same notwithstanding wherewith I dis-
“ pense for that effect.”

Mr. Leith died in 1763, without leaving any issue male of his own body, and was succeeded by John Grant, the eldest son of his daughter Anna. John Grant, who never made up his titles, died without issue, and was succeeded by John Shepherd, the eldest son of Janet, the second daughter.

Accordingly he made up titles under the entail, and was infeft in the year 1790, and possessed the estate till August 1832, when he died without issue.

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On his death the succession would, in terms of the destination, have opened to the eldest son of Margaret, the entailor's youngest daughter. She was married, and had one son; but he died without issue in 1794, so that this branch of the destination was exhausted before John Shepherd's death.

Failing the eldest sons of the entailor's three daughters, the estate accrued next, in terms of the destination, to the second sons in succession; and, first, to the second son of Anna, the eldest daughter.

But before this time her two sons, James and Alexander Grant (as to whom there was a dispute which was the second) had died; and Alexander Shepherd, the second son of Janet (the second daughter), took up the estate under the next branch of the destination, and was served heir in February 1834, under the entail, to his brother John, and was infeft on a crown charter in June thereafter.

On his death a competition arose between the appellant James Shepherd, the eldest son and representative of the Rev. Robert Shepherd, who was third son of Janet, and the respondent Robert Grant, the fourth son of Anna the entailor's eldest daughter.

Both parties took out brieves for being served, and brought advocations; which being reported to the Second Division of the Court, their Lordships pronounced the following interlocutor on the 1st December 1836:—
“ The Lords, on report of Lord Cockburn, ordinary,
“ having considered the cases for the parties with the
“ other proceedings, and heard counsel thereon, find that,

SHEPHERD “ under the destination of the deed of taillie founded on
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 GRANT. “ in the present competition, the claim made on the
 28th May 1838. “ part of Robert Grant is preferable to that on the part
 “ of James Shepherd: find expenses due to the said
 “ Robert Grant, and remit to the Lord Ordinary to
 “ proceed accordingly.”*

After some farther proceedings necessary to exhaust the case, Mr. Shepherd appealed.

Appellant.—The construction of the clause embraces two points; viz., 1st, the meaning of it, so far as it relates to the first and second sons of the several daughters; and, 2dly, the meaning of that part of it which provides for the succession after the eldest and second sons of all the daughters are exhausted.

It is clear that the eldest and second sons of the several daughters in the deed alternately called to the succession must mean the eldest and second sons born of the several daughters, and not merely those who might become eldest or second sons, though not such originally by the predecease of others. There were five existing grandsons by the eldest daughter, and four by the second daughter, at the date of the deed, and the entailer had them distinctly in view as existing persons when he made the entail. At the same time he wished to give the sons of his third daughter, Margaret, if she had any, an equal chance of succeeding with the sons of the other daughters. But with reference to them all, priority of procreation and of birth is the leading criterion of priority of succession. The desti-

nation is first to the eldest son procreat betwixt John Grant and the eldest daughter, and the heirs male of his body, then to the eldest son procreat betwixt Thomas Shepherd and the second daughter, and the heirs male of his body, then to the eldest son to be procreat of the third daughter, and so on in similar terms with regard to the second sons of the three daughters seriatim. Throughout the whole enumeration the eldest or second son procreat of each daughter is distinctly pointed out; and there is not the slightest hint of the destination referring to those who, though not procreat or born eldest or second sons, might become so through the predecease of their elder brothers. Any other construction is directly contrary to the words of the deed.

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The only sense which these words, "whom failing, "to the heirs male of my said first, second, and third daughters, in the same order of succession," can bear, is, that the third, fourth, fifth, and other sons of the several daughters, and the heirs male of their bodies respectively, are to take in an alternative series according to their seniority of birth, or at all events according to their seniority in their respective families at the time of the entailer's death; or, in other words, that this clause is merely an abbreviated mode of carrying out as to third and other sons of the several daughters, and the heirs male of their bodies, the same destination which was provided in express terms with regard to the eldest and second sons.

The words, "the heirs male of my first, second, and third daughters," cannot mean heirs male general, for it may now be assumed as settled law that the word "heirs" or "heirs male" is a flexible term, and may

SHEPHERD from the context of any deed be interpreted to mean
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GRANT. heirs male of the body. This point was established
 28th May 1838. after most careful argument and deliberation by this
 House in the Roxburghe competition.* The authority
 of that case has been followed since, in that of *Tinnoch*
v. Maclewnan, 26th November 1817, where a destination
 to a certain person, "and his heirs and successors whom-
 "soever," was found, in consequence of a provision in
 the same clause, that on his failing "without a lawful
 "child or children existing of his body," the subject
 should return to the granter and his heirs whatsoever,
 to mean heirs of his body and not his heirs general.
 In a later case, *Mudie v. Anderson*, 11th June 1829†, a
 discharge of an annuity, which bore in the obligatory
 clause to be for the benefit of the granter's two
 daughters, and their heirs and assignees, was held, in
 consequence of the narrative of the inductive clauses
 of the deed as contained in the preamble, to be limited
 to them and the heirs of their bodies. It is thus
 established that heirs or heirs male do not necessarily
 and inflexibly mean heirs or heirs male general, but
 admit of a more limited construction if required by the
 context of the deed. But it is evident from the deed
 in question, that the clause now quoted cannot mean
 the heirs male general of the several daughters. In
 the first place, the heirs male are called quite separate,
 and in contradistinction from each other, with re-
 ference to the several daughters; i. e. the heirs male
 of the first daughters are called as a set of persons
 quite distinguished from the heirs male of the second

* 23d June 1807, *Morr. App. No. 13*, voce *Taillie*; 15th to 19th June 1809, *Fac. Col. ante App. to vol. vi.*

† 7 S. & D., 743, and F. C.

daughter, and the heirs male of the third daughter as distinguished from both. The heirs male of the first, second, and third daughters are by the clause called "in the same order of succession" as the first and second sons of these three daughters, viz. in alternate series, and as persons clearly distinguished from each other in the mind of the entailer. But the heirs male general of the several daughters could not be distinguished from each other, because, failing the heirs male of their bodies, the same individuals would have been heirs male of them all.

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If the words heirs male meant heirs male general, the heir male general of the eldest daughter would exclude the heirs male of the body of the second and third daughters, contrary to the preamble of the deed, which limits the succession to the entailer's grandsons, and their heirs or heirs male of their bodies. Thus, according to this construction, if all the sons of Anna the eldest daughter had died without male issue, any collateral male relation of the eldest daughter, say an uncle, or any of his male descendants, or any male relation of her's in the line of ascendants, would have excluded the claimant Mr. Shepherd, though a son of one of the entailer's grandsons. Such a construction therefore is inadmissible, because it leads to a result directly contrary to the entailer's intentions as expressed in this very deed.

From the whole structure of the deed, it is plain that, in this branch of the destination, as well as in the rest of it, the sons of the several daughters were intended as well as in the preceding clause. The preamble of the entail clearly indicates the granter's intention to destine the estate exclusively to his grand-

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children and their heirs, or, as the context proves, to his grandsons and their heirs male. It is with this limited intention that the clause now in question, as well as the previous clause of the deed, was framed; and such an intention can be effectuated only by interpreting heirs male of the several daughters to mean heirs male of their bodies, or in other words their issue male. Perhaps the phrase here used, "the heirs male of my said first, second, and third daughters," may be held in itself to mean the heirs male belonging to them respectively and separately, or in other words the heirs male of their respective bodies. But at all events the limitation of the granter's purpose, as announced in the preamble of the deed, to his grandsons and their heirs, demonstrates that by the clause in question he could not mean to call any but the heirs male of the bodies of his three daughters respectively. Farther, the phrase heirs male here employed cannot mean all the heirs male of the bodies of the several daughters, because if it did it would involve a repetition of the previous clauses which had already called part of the heirs male of the bodies of each of the daughters, viz. the eldest and second sons of each seriatim, and the heirs male of their bodies, and would thus contradict the clause now in question, which declares that the destination in it shall only take effect when the first and second sons of the several daughters have failed. The clause must therefore mean heirs male of the bodies of the different daughters, distinct from those who had been already called, or in other words the remaining heirs male of their bodies, viz. the third, fourth, and fifth sons of the several daughters seriatim. This construction follows directly from the words of the

clause, combined with the previous clause, and with the context of the deed.

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In addition to the words "whom failing, to the heirs male of my said first, second, and third daughters," there are the important words "in the same order of succession." These words afford a key to the whole clause. Their evident meaning is, that the same principle of alternation and equality shall be followed with regard to the male representatives of the several daughters called in this clause, as had been specially pointed out before with regard to the eldest and second sons of all the three daughters. This must mean that when the second sons of all the daughters are exhausted there shall be taken, first the third son of the eldest daughter, and the heirs male of his body; secondly, the third son of the second daughter, and the heirs male of his body; and lastly, the third son of the third daughter, and the heirs male of his body; since this is the precise order of succession pointed out in the previous clause with regard to the eldest and second daughters. These words are quite inconsistent with the construction, that the whole heirs male of the eldest daughter's body are to be exhausted first, then the whole heirs male of the second daughter's body, and lastly, the whole heirs male of the third daughter's body: that would not be to follow "the same order of succession" pointed out in the preceding clause, but an entirely different order of succession. The rule laid down and enforced from beginning to end of the deed, is that of equality between the male descendants of the several daughters, so far as compatible with seniority and with an undivided male

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succession. The "order of succession" by which this rule is followed out in the preceding clause is, that the estate shall go first to the eldest son of the eldest daughter, and the heirs male of his body; then, in like manner, to the eldest son of the second daughter, and the heirs male of his body; and then to the eldest son of the third daughter, and the heirs male of his body; and so in like manner to the second sons of the several daughters in their order of seniority, and the heirs male of their bodies respectively. To follow out, therefore, "the same order of succession" after the second sons of each of the daughters, and the heirs male of their bodies, are exhausted, it is necessary that the same rule of alternation should be followed with regard to the other heirs males of their bodies; viz., that after the second son of the third daughter, if any, and the heirs male of his body, there should come in the third son of the eldest daughter, and the heirs male of his body, then the third son of the second daughter, and the heirs male of his body, and lastly, the third son of the third daughter, if any, and the heirs male of his body; and so on with regard to the fourth, fifth, sixth, and other sons of the several daughters alternatively ad infinitum. It would be a complete violation of this order of succession, as well as of the rule of equality between the issue of the different daughters which runs through the whole deed, to say that the whole remaining heirs male of the body of the eldest daughter should take before any of the other heirs male of the body of the second daughter, and the whole of these again before any of the heirs male of the body of the third daughter. The words "in the same order of succes-

sion," are quite irreconcilable with such an arrangement.*

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Respondent.—In considering the question of construction, the respondent may assume, that in the ordinary case of a destination to the eldest son of a marriage, whom failing, to the second son, whom failing, to the third son, and to their heirs male respectively, the clause must be construed as carrying the estate to the children holding the character of first, second, and third sons at the time the succession respectively opens to them.

This is well settled in the practice of conveyancing; and the rule of law on which that practice is founded is a very simple one. Where a general term is employed in a deed, such as "the eldest son," or "the second son," the granter, in the absence of any other expression to control its meaning, is presumed to have in view the individual who holds the character at the time the donation in his favour is to take effect. If it is a particular individual who is to be singled out, as the donee, the course invariably adopted is to mention him nominatim. But wherever this course of specifying the individual by name is departed from, and the more general form of expression adopted, it is a presumption of law that the granter did not intend to single out a particular party, but to designate

* *Mowbray v Scougall*, 9th July 1834, 12, S., D., B., 910. F. C., and cases there referred to; *Fergus v. Fergus*, 7th Feb. 1833, 11 Sh., D., & B., 362; *Ramsay v. Ramsay*, 26th Feb. 1836, 14 M., D., & B., 570; *Kerr*, 10th March 1835, 13 M., D., & B. 652; *Smith v. Stewart*, 14th Dec. 1830, 9 S., D., B., 181, Fac. Coll.; *Campbells v. Campbell*, 17th May 1836, 14 M., D., & B., 770; *Red House Creditors v. Gloss*, 15th June 1743, *Morr.* 2306; *Ewing v. Miller*, 1st July 1747, *Morr.* 2308.

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generally the individual who, holding at the time the character pointed out by the general form of expression, was intended to be favoured.

The phraseology of the clause of destination, in so far as it is in favour of "the eldest" and "the second sons" of the entailer's daughters respectively, is employed in the ordinary language of conveyancing to denote the eldest or second sons at the time the succession opens to them; effect should be given to these terms according to their ordinary acceptation, unless there be something in the other provisions of the deed which, by express declaration, or plain implication, controls them.

But the entail in question contains nothing which is calculated to individualize the general form of expression; there is nothing to show that it was to his grandchildren, in the order of their birth, the granter intended his estates to descend. On the contrary, the leading object of the deed was to preserve a strict equality among the family of his three daughters, the children of the eldest being always preferred to those in the same degree of the younger daughters. It was clearly the entailer's intention that the eldest sons of his three daughters, whoever held that character, should have the beneficial enjoyment and possession of his property, in succession; and, in like manner, on their extinction without issue, that the second sons, and their heirs male, should enjoy the same privilege. This equality, however, can only be preserved by all the grandsons holding and possessing the estate respectively in their order. Any departure from this rule would evidently lead to an inequality in the enjoyment of the estate by the families of his respective

daughters, entirely at variance with the true intention of the testator.

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This view is materially strengthened by the fact that the entailer refrained from calling his grandchildren nominatim, although those descended of his eldest and of his second daughters were all born at the time, seeing that the result of such a destination would have been to introduce the very inequality against which he was anxious to guard.

It is also confirmed by the peculiarity in the deed by which, after destining the estate to the heirs male of his own body in fee, he introduces this substitution, "whom failing, to the eldest son living at the time of my decease, procreated betwixt John Grant younger, of Rothmaise, and Anna Leith my eldest daughter."

The qualification, "to the eldest son living at the time of my decease," is merely annexed to the eldest son of John Grant; it is not added as a qualification to any of the other sons descended from any of his other daughters. If he had intended to call all the heirs in the order of their seniority, as they stood either at their births or at the time of his death, such intention would have been clearly expressed. But the application of this qualification to one of the substitutes shows that as to the others the ordinary rule of law was to receive effect.

But, independently of that rule, the clause of destination calls in the grandchild, who, on the death of the second sons of Janet and of Margaret, held the character of heir male of the eldest daughter. It declares that it is "the heir male of the first, second, and third daughters, in the same order of succession," who is to succeed. But as the eldest and second sons of all

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the daughters are extinct without issue, can it possibly be maintained that the claimant is not the nearest and lawful heir male of the eldest daughter? All his elder brothers having died without issue, there is no one who can interfere with him in claiming that character. His brother Alexander, who, although born before him, died in infancy, cannot stand in his way; and there is no other member of the claimant's own family who can compete with him.

Being then the heir male of the eldest daughter, it is clear that in that character he stands preferred by the clause of destination to the heir male of the second and third daughters.

LORD CHANCELLOR.—My Lords, there was a case which was heard before your Lordships last week, in which I was desirous, before I stated to your Lordships the view I took of the case, to have an opportunity of reading the papers, not, certainly, from any doubt I entertained at the time of the discussion, but because in a case of ultimate appeal to your Lordships jurisdiction it is expedient to take every possible care that no error creeps in before your Lordships proceed finally to decide the right of the parties. My Lords, the re-perusal of these papers has only confirmed the very strong opinion I had formed at the time the argument took place.

The contest arose between an individual who claimed as the eldest heir male of Anna the eldest daughter of John Leith of Blair, and the son of the third son of Janet the second daughter. It appears that at the time the entail was made the entailer had three daughters, Anna, Janet, and Margaret; Margaret the third daughter was

not married, but Anna was married to Mr. Grant, and Janet was married to Mr. Shepherd, and both had several children. In that state of the family the testator made this entail. After disposing in favour of himself in life-rent, "and to the heirs male lawfully to be procreate
 " of my own body in fee; whom failing, to the eldest
 " son living at the time of my decease procreat
 " betwixt John Grant younger of Rothmaise and Anna
 " Leith my eldest daughter, and to the heirs male of
 " his body, in fee; whom failing, to the eldest son of
 " Thomas Shepherd, minister at Bourty, procreat
 " betwixt him and Janet Leith my second daughter,
 " and the heirs male of his body, in fee; whom failing,
 " to the second son procreat betwixt the said John
 " Grant and the said Anna Leith my eldest daughter,
 " and the heirs male of his body, in fee; whom failing,
 " to the second son of the said Thomas Shepherd, pro-
 " creat betwixt him and the said Janet Leith my
 " second daughter, and the heirs male of his body;
 " whom failing, to the second son lawfully to be pro-
 " creat of the body of Margaret Leith my third
 " daughter, and the heirs male of his body, in fee;
 " whom failing, to the heirs male of my said first,
 " second, and third daughters in the same order of
 " succession."

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My Lords, it appears that Anna, the eldest daughter, had five sons. John, the eldest, succeeded upon the death of the entailer, and upon the death of that son John, the son of Janet the second daughter, succeeded. It appears that upon the death of that son, which took place, I think, in the year 1832, Alexander, the second son of Janet the second daughter of the entailer, entered into possession of the estate; but upon his

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death in 1836 the question arose whether Robert, who had been the fourth son of Anna the daughter of the entailer, but who, by the death of James the second son, Alexander the third son, and the death of John, became in fact the only son at the time living of Anna the eldest daughter of the entailer, was not entitled. The contest arose between him and James the son of Robert the third son of Janet.

Now, my Lords, the first question which the Court of Session had to decide was, which was the preferable title of those two? James the son of Robert, who was the son of Janet Shepherd, claiming through the third son, of course could not claim, and does not pretend to claim, under the words to be found in the deed, because here the direct succession is only to the eldest son of the three daughters in succession, and then to the second son of the three daughters in succession, and then generally there is a provision in favour of the heirs male of either of the daughters. But the descendant of the third son of Janet says he is entitled under those words, "whom failing,"—that is, the first and second son of the three daughters,—"whom failing, to the heirs male of my said first, second, and third daughters in the same order of succession." Now the heirs male of Anna are unquestionably now existing; Robert is the son, and therefore the heir male, of Anna the eldest daughter; and if the heirs male of Anna are first to take, and then, whom failing, the heirs male of Janet, so long as there is an heir male of Anna no one can take as the heir male of Janet, inasmuch as the succession is between heirs male, and not between sons. But then James, the son of Robert, says, those words are not to be construed according to their obvious

meaning; that “they are not to be construed as heirs
 “ male, but that the limitation is to be expanded as
 “ having provided for the first and second sons, and
 “ so to be construed that the same species of limitation
 “ may be carried through all the successive sons of the
 “ three daughters, as if he had said, ‘failing the second
 “ ‘son of the three daughters, then the third son of
 “ ‘the second, then the third son of the third.’” My
 Lords, no authority has been quoted, and it would be
 very strange indeed if an authority could be found,
 showing that according to the practice of the law of
 Scotland the courts would be entitled so to deal with
 the words in the deed. The entailer has not said so;
 he has said the reverse. Instead of providing for the
 third son of the second daughter, he has provided for
 the heir male of the eldest daughter; and it is only on
 failure of the heirs male of the eldest daughter that
 any person can come into competition as an heir male
 of the second daughter. But supposing it possible so
 to construe the deed, supposing that the ordinary suc-
 cession had taken place, and it was competent to your
 Lordships to put that construction upon the deed,
 what would be the consequence? The consequence
 would be, to continue the succession in the order in
 which he has described it, to the descendants of the
 first and second daughter. Then would not the effect
 of that be, that upon the death of John, the eldest
 son of Janet, it would go, if you can find a person
 answering the description, to the second son of Anna,
 the eldest daughter? Daughters being out of the ques-
 tion—one being born who did not live,—then we are
 to ascertain whether there is any person to answer that
 description. In point of fact, although Robert had

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SHEPHERD been the third son, yet at the time of the death of
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 28th May 1838. therefore, which it is not material to look to, according
 to the construction I put upon this deed, when it is
 necessary to look for a person answering that descrip-
 tion,—Robert was in fact the second son of Anna,
 inasmuch as James, originally the second, and Alex-
 ander, originally the third, had died before that period
 arrived. John the eldest son had enjoyed the estate.
 If, therefore, the testator meant to provide for the sons
 in succession, first, second, and third, in the order in
 which they would be found in being at the period
 when the succession opened, Robert would be the
 person entitled under the deed of entail; he would be
 the second, and it would not be necessary to consider
 the effect as to the third, he being the second.

The principal contest, or one of the great contests at your Lordships bar is, whether, in the principle of Scotch law, you are to look at the individual answering the description at the time the entail opened, or at the death of the testator. The Roxburgh case was cited for this purpose; it was cited on both sides, and arguments drawn on both sides. It was attempted to be shown that it was in the first place in favour of the appellant; that the limitation being to the eldest daughter, and the eldest daughter having died, and the party ultimately claiming, and who ultimately succeeded, not being the descendant of the eldest daughter, it was held by the Court of Session, and by your Lordships House, that under the particular terms to be found in that deed of entail the party claiming through a daughter not being the eldest daughter was entitled to succeed. The case was used on the

part of the appellant to show that it was competent to consider a limitation of that sort as expanded; and that though no expression was used in the Roxburgh case but "the eldest daughter and her heirs," it was to be considered as including in succession the eldest, and the second, third, and fourth.

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On the other side it was contended for the respondent that it was competent, taking a limitation so framed, and that in fact the Court of Session were compelled to inquire who answered the description at the particular time of the succession opening.

Beyond all question it is applicable for that purpose, taking that to be the rule which is established in the Roxburgh case; and looking to the words in this deed, it appears to me there is no doubt that the Court is to look, not to those who answered the description of first, second, and so on, at the time of the entailor's death, but to those who answered the description at the time the succession opened.

This appears to me to be the true way of construing the deed. The entailor provides, first of all, for the eldest son of his eldest daughter. It is quite clear that that refers to the eldest son at the time of his own death; for he says expressly, with reference to him, to the eldest son "living at the time of my decease." It is clear then that he did not mean to say, I do not leave it to the individual who may happen by birth to be first, or second, or third, but looking at the period at which the party would become entitled, I mean that that party who shall answer the description at the time the title applies shall be the party to take. By the appellant's way of reading the deed this most extraordinary intention would be imputable

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to the intention of the party. You must look, not at the time the title accrued, but to the time of the death of the entailer, though all her issue might fail before the time to succeed arrived.

Where he comes to provide for the next party,—that interest was necessarily indefinitely postponed; it is of course uncertain whether the others will ever be interested at all, or if so, who will become the next taker,—there we find the expression varied,—“whom failing, “to the eldest son of Thomas Shepherd,” not “the “eldest son living at the time of my death.” The eldest son of the eldest daughter living at the time of his decease was the person to take, because that was the period at which the interest was to accrue; but when he looks forward to the future period, and the individual then to take, it is no longer “to the eldest “son living at my decease,” but it is “to the eldest “son;” and so it goes on till you come to Margaret, who had no son, and then it is “the eldest son to be “procreat,” there being no person to answer that description. All these persons must be known; they were all his own grandchildren, all persons in esse, and capable of personal description. Why does he not personally describe them? Because he does not mean them to take personally, but by the character of first, second, or third, at the time the succession opened.

My Lords, it appears to me to have been ascertained by the Roxburgh case that that is a construction which may, according to the law of Scotland, be put upon the deed. But this deed contains upon the face of it very remarkable evidence of an intention that they should take by the description they might answer at the time the succession opened. At the time the suc-

cession opened Robert was the party entitled, inasmuch as he was the second of the sons of Anna who could come into the enjoyment of the estate, Alexander having died, and the question arising, Who is entitled to this possession? It cannot prejudice the title of Robert, that he might assert it against Alexander. When, therefore, my Lords, we look to the very terms to be found in this deed, if that be the true construction, then there is an end of the contest.

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But if that were not so obvious upon the deed,—if it were considered that the series of the limitations to the first and second sons of the three daughters was entirely exhausted, which in my opinion it is not, but that Robert was entitled to come in as the second son of Anna,—but even if those limitations were considered as exhausted, we then come to the second limitation, which is, in case of the first and second sons of the three daughters being exhausted, “to the heirs male of “my said first, second, and third daughters, in the “same order of succession;”—and Robert is the heir male of Anna, the eldest daughter. There is no ground whatever, in my opinion, why the Court should put a construction upon those words different from that which is admitted to be their ordinary meaning; and taking it either way, it appears to me that the appellant cannot succeed.

On these grounds, my Lords, I am of opinion we should concur in the unanimous opinion of the Judges of the Court of Session, that the title of Robert must be preferred. And, my Lords, as the decision of this case was an unanimous decision of the Court of Session, and no argument can be adduced in support of a contrary judgment, I am of opinion that your Lord-

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ships must affirm the judgment of the Court below,
with costs.

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DEANS and DUNLOP—RICHARDSON and CONNELL,
Solicitors.

[25th June 1838.]

JOHN MORRISON and others, Appellants.—*Stuart*.JAMES MITCHELL, Respondent.—*Russell*.

Road.—Held, that under the Stirlingshire road acts (34 Geo. III. c. 138. and 50 Geo. III. c. 16.) persons who use carriages for travelling on the tracking paths or roads on the banks of the canal may be considered guilty of evading the tolls, notwithstanding they do not travel one hundred yards on the turnpike road.

Process—Jurisdiction.—Penalties being imposed by a road act for evasion of tolls on conviction “before one or more “justices of the peace,” with leave to persons considering themselves aggrieved to apply by summary complaint to the Court of Session,—Questions, 1, Whether an advocacy be a competent form of complaint? 2, Whether that Court has jurisdiction to convict and find offenders liable in the penalties? and, 3, Whether there must be a conviction by the justices?

THIS case originated in an action by the respondent Mitchell, tacksman of the Kerse toll-bar, raised before the justices of Stirlingshire, against the appellants, founding on the statutes 34 Geo. III. c. 138. and 50 Geo. III. c. 16. and the general road act (4 Geo. IV. c. 49.), for payment of penalties in respect of an evasion of the toll bar by using carriages in travelling on the tracking paths or roads upon the banks of the Forth and Clyde canal. The justices having assolized the appellants, Mitchell brought the case under review of the Court of Session by bill of advocacy, on advising which Lord Eldin pronounced the following interlocutor:—“Remits to the justices of Stirlingshire, with “instructions to recal their interlocutors against the “complainers (appellant); to find that all persons who

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“ use coaches or other carriages for the purpose of
“ travelling upon the tracking paths or roads upon the
“ banks of the canal must be considered as evading
“ the tolls in the true meaning of the statute, and liable
“ to the penalties therein contained; to allow the com-
“ plainers a proof of their allegations, and thereafter to
“ decide according to the rules of justice, and to find
“ the respondents liable in all the expenses hitherto
“ incurred by the complainer,” &c. This interlocutor
having been brought under review of the Inner House,
their Lordships recalled it, and passed the bill; and a
great deal of procedure took place, which resulted in a
judgment by the Court (7th July 1827), finding the
appellants “ guilty of evading the Kerse toll-bar by
“ driving their coaches and carts along the banks of the
“ canal, and therefore liable to the advocator in the for-
“ feiture and penalties imposed by the statutes libelled
“ on;” and remitting to the Lord Ordinary “ to ascer-
“ tain the amount, and decern for the same,” which was
accordingly done on the 20th November thereafter.¹

The appellants having appealed, the following judg-
ment was pronounced:—“ Inasmuch as a question has
“ been raised at the bar of this House respecting the juris-
“ diction exercised by the Court of Session in this matter,
“ which does not appear to have been discussed or con-
“ sidered in that Court, it is ordered and adjudged by
“ the Lords Spiritual and Temporal, in parliament
“ assembled, that the cause be remitted back to the
“ Second Division of the Court of Session to consider and
“ state their opinion whether the Court has, by the law
“ of Scotland, any jurisdiction, upon a bill of advocacy,
“ to find a defender liable in penalties under the acts in

¹ 5 S. D. 909 (new ed. 843).

“ the pleadings in the cause mentioned, or either of them,
 “ such defender not being convicted before a justice or
 “ justices of the peace ; and the said Second Division of
 “ the Court is hereby required to take the opinion of
 “ the Judges of the other Division of the Court, and of
 “ the permanent Lord Ordinaries, upon this question.”¹

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In compliance with the above remit the Second Division consulted the other Judges, who delivered the following opinion :—“ In answering this question we are not disposed to adopt the argument of the defenders on the absolute incompetency, under any circumstances, of advocacy from the judgments pronounced by the Quarter Sessions. The statute merely provides, ‘ that ‘ if any person or persons shall think himself, herself, ‘ or themselves aggrieved by the judgment of the ‘ Quarter Sessions, it shall be lawful for such person ‘ or persons to apply for redress by summary complaint ‘ to the Court of Session.’ And considering that the right of review by advocacy is one which might, at common law, have been competently exercised, we do not think that the pointing out in the statute of a summary mode of redress by complaint can, in sound construction, be held to exclude that right. But then, of course, no judgment or finding can be competently pronounced by the Court in such advocacy, which is inconsistent with the provisions of the statute. The express provision of the statute in regard to penalties for the evasion of toll-bars is, ‘ that any ‘ person being thereof convicted on the oath or other ‘ legal testimony of one or more credible witness or ‘ witnesses before any one or more justices of the ‘ peace for the said county of Stirling shall for every

¹ See 4 Wilson and Shaw, p. 162, 14th July 1830.

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“ ‘ such offence forfeit and pay to the said trustees, or
“ ‘ to their treasurer for the time being, the sum of 20*l*.
“ ‘ sterling.’ In the present case there was no conviction before one or more justices: on the contrary, the justices, adopting a particular view of the legal effect or relevancy of the pursuer’s averments, found it unnecessary to proceed to proof, and at once assoilzied the defenders. Now, in these circumstances we do not consider an advocacy to be incompetent; and, on the supposition of the judgment of the justices being erroneous, we think that it would have been competent in such advocacy to remit the case to the justices, with instructions correcting their error, and directing them to allow the pursuer a proof, and to proceed to determine the case in terms of the statute.

“ But by the interlocutor appealed from, the defenders are found guilty of evading the toll-bar; and a remit is made to the Lord Ordinary to ascertain the amount of the penalties. It appears to us that this mode of procedure is not only unauthorized by, but is contrary to the provision of the statute, which requires a conviction of every such offence, ‘ on the oath or legal testimony of one or more credible witnesses before any one or more justices of the peace for the county of Stirling.’ And therefore, in answer to the question now put to us, we submit, under the above explanation, that in our opinion the Court of Session has not, by the law of Scotland, any jurisdiction, upon a bill of advocacy, to find a defender liable in penalties, under the acts in the pleadings in the said cause mentioned, or either of them; such defender not being convicted before a justice or justices of the peace.”

The Judges of the Second Division concurred in this

opinion, and on the 21st January 1832 found that
 “ the Court of Session has not, by the law of Scotland,
 “ any jurisdiction, upon a bill of advocacy, to find
 “ a defender liable in penalties under the acts in the
 “ pleadings in the said cause mentioned, or either of
 “ them, such defender not being convicted before a
 “ justice or justices of the peace.”¹

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On this judgment, containing the opinion of the Court, being reported to the House of Lords, their Lordships resumed consideration of the appeal, and parties were heard on the merits accordingly.

LORD CHANCELLOR.—A declaration as to the course the justices should adopt will be the proper course, and meet the substantial justice of the case.

The House of Lords ordered and adjudged, That the interlocutor of the Court of Session in Scotland, of the Second Division, of the 7th (signed the 11th) of July 1827 and 20th November 1827, complained of in the said appeal, be and the same is hereby reversed; and it is hereby declared, that persons who use coaches or other carriages for the purpose of travelling upon the tracking paths or roads upon the banks of the canal may be considered guilty of evading the tolls within the true meaning of the statute, and liable to the penalties therein contained, notwithstanding that they do not travel one hundred yards on the Kerse Road: And it is further ordered, That the said cause, with this declaration, be remitted back to the said Second Division of the Court of Session, to give directions to the justices to allow the respondent a proof of the allegations, and thereafter to decide according to the rules of justice and this judgment.

D. CALDWELL—A. FRASER, Solicitors.

[20th July 1838.]

ADAM MONTEITH and others, Appellants and Respondents.—*Sir William Follett—Dr. Lushington—Monteith.*

ROBERT M'GAVIN, Respondent and Appellant.—
Hill—Austin.

Burgh—Process—Stat. 3 & 4 W. IV. c. 76.—A claimant for enrolment as a voter in a royal burgh was admitted by the sheriff to the roll of parliamentary voters, and his name was transferred to the list of municipal electors appointed by the municipal reform act to be completed on or before the 16th of September yearly, but the judgment of the sheriff admitting him was reversed by the Appeal Court, and his name struck out of the parliamentary roll in October thereafter :—Held (affirming the judgment of the Court of Session) that he was, notwithstanding, qualified to be elected a councillor of the burgh at the immediately ensuing election in November. Question, Whether suspension and interdict be a competent mode of trying the validity of the election of a town councillor, under the municipal reform act, whose induction to the office had not been completed?

2D DIVISION. BY the 2d and 3d Will IV. c. 65., intituled “An
L. Cuninghame. “ Act to amend the representation of the people
“ in Scotland,” a new qualification is introduced for electors of members of parliament, both in counties and in burghs, and a mode of ascertaining that qualification

is established by means of an annual registration, to be conducted by the sheriffs of the respective counties. For this purpose each sheriff is to hold an annual court of registration both for county and city parliamentary voters, in which he is to decide all claims or objections on or before the 15th of September in each year; and by the 23d section it is enacted, "That the sheriffs judgments, granting or refusing registration, shall, so long as they remain unaltered, be conclusive of the rights of parties claiming or objecting as above, but that it shall be competent to any party considering himself aggrieved by any such judgment to appeal, and apply for an alteration thereof," in manner therein mentioned.

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By section 25th it is provided, that appeals from the sheriffs judgments on any annual registration shall be made to certain sheriffs constituting Courts of Review, and it is enacted, "That the judgments of the said courts of review shall in all cases be final and conclusive, and liable to no process of review, and shall, whenever they reverse or vary the judgments of the sheriff appealed from, be warrants to him to alter or correct his registers in conformity thereto; and he shall, on such judgments being made known to him by the parties, alter and correct such registers accordingly."

By the same section it is provided, that the cases thus brought under review shall be decided on or before the 20th of October in each year.

By the 3d and 4th Will. IV. c. 76. sec. 1., intituled "An Act to alter and amend the laws for the election of the magistrates and councils of the royal burghs in Scotland," it is enacted, "That from and

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“ after the period when this act shall come into opera-
“ tion, the right of electing the town council in all
“ such burghs respectively (except in those contained
“ in schedule F. to this act annexed) shall be in and
“ belong to all such persons, and to such only (except
“ as herein-after excepted), as are or shall be qualified
“ as owners or occupiers of premises within the royalty,
“ whether original or extended, of any such burgh, to
“ vote in the election of a member of parliament for such
“ burgh, by virtue of an act passed in the 2d and 3d
“ year of the reign of His Majesty King William IV.,
“ intituled ‘ An Act to amend the representation of the
“ ‘ people in Scotland,’ and as are duly registered as
“ such voters in the registers by the said recited act
“ appointed to be kept, and also in all such persons
“ who are possessed of the qualifications described in
“ the said recited act, in respect of the property or
“ occupancy of any house or other subject therein
“ described, of the value thereby required, within the
“ royalty of any royal burgh not now entitled to send
“ members to parliament: Provided always, that all
“ such electors who may be qualified as herein-before
“ provided shall have resided for six calendar months
“ next previous to the last day of June in this and all
“ future years within the royalty of such burgh, or
“ within seven statute miles of some part thereof:
“ Provided also, that no person shall be entitled to vote
“ who has been in the receipt of parochial relief, or
“ who has been a pensioner of any corporation within
“ twelve months of any such annual election, or for
“ any burgh of which he may have been town clerk at
“ the time of such election, or of making up the list or
“ roll of electors with a view to such elections.”

By the 4th section it is enacted, "That the respective town clerks of each royal burgh shall, on or before the 20th day of October in the present, and on or before the 16th day of September in all future years, make up and complete a list or roll of persons entitled to vote in the election of the common council of such burgh, in manner following; viz. the town clerk of each burgh which, in virtue of the said recited act, sends, either severally or in combination with any other burgh or burghs, a member or members to parliament, shall make up and complete such list by transferring from the parliamentary register for such burgh to such list or roll the names of all the voters contained in such register entitled to vote in the election of a member of parliament, as are so registered in respect of properties situated within the royalty, whether original or extended, of such burgh, without requiring any claim, or admitting any objections against the persons so registered."

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By sections 7, 8, and 15, it is provided that certain burghs (of which Glasgow is one) shall make their elections by wards, and that on the first Tuesday of November in each year "the electors qualified and entered on the list or roll made up as aforesaid shall choose from among such of their own number as either reside within the boundaries assigned to such burgh by the said recited act, or as may carry on business or reside within the royalty thereof, such a number of councillors as, by the set or usage of each burgh respectively, at present constitutes the common council of such burgh."

In May 1837 Mr. M^cGavin, having removed from

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the premises in respect of which his name stood upon the register, lodged a claim at the proper time to be registered of new, which claim was admitted by the sheriff in September, and delivered to the clerks to be registered. Accordingly Mr. M'Gavin's name was inserted by the clerks in the register of parliamentary voters before the 15th of that month; and on the 16th, the clerks proceeded to make up the list of persons entitled to vote in the election of the council, by transferring the names from the parliamentary register to that list, and, among other names, they transferred that of Mr. M'Gavin. An appeal in the meantime was taken against the admission of Mr. M'Gavin by the sheriff, and on the 4th of October the claim was rejected by the Court of Appeal, and his name was accordingly expunged from the parliamentary list.

On the 4th November, being three days previous to that on which the election to municipal offices was to take place, and Mr. M'Gavin being then a candidate for the office of town councillor, the appellants, who were electors in an opposing interest, served upon the town clerks a requisition and protest, calling upon them to make the necessary alterations in the municipal list, so as to be in conformity with the parliamentary register as completed by the judgment of the Court of Appeal. The town clerks declined to do so, for the reasons stated in this answer:—" In terms of
" the 75th section of the parliamentary reform
" act, wherever the Court of Appeal reverses or
" varies the judgments of the sheriff, the parliamen-
" tary registers must be altered and corrected accor-
" dingly; but there is no such direction or authority
" given in the burgh reform act for the town clerks

“ of the burghs contained in the parliamentary reform
 “ act to alter the burgh list or roll directed to be made
 “ up on or before the 16th of September annually.

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“ In these circumstances the town clerks, though of
 “ course anxious to discharge, to the best of their
 “ ability, the ministerial duties imposed on them,
 “ consider that, under the terms of the statutes before
 “ referred to, they are not empowered and would not
 “ be warranted for the present year to make any
 “ alteration whatever upon the list or roll for the
 “ burgh, as compiled from the parliamentary register as
 “ adjudicated by the sheriff, prior to the 16th of Sep-
 “ tember, on or before which day the town clerks are
 “ directed to make up or complete the said list or roll ;
 “ and the town clerks must therefore decline complying
 “ with either of the requisitions contained in the said
 “ schedule of protest until directed to do so by com-
 “ petent authority.”

The election of town councillors proceeded on the 7th November, and on that day the appellants served a protest on Mr. M'Gavin against his offering himself as a candidate, as being disqualified to be a councillor ; and on the same day they presented a bill of suspension and interdict, on which the Lord Ordinary pronounced the following interlocutor :—

“ Having considered this bill, appoints it to be inti-
 “ mated, and answers thereto to be lodged betwixt and
 “ Wednesday the 15th current ; and in respect of the
 “ novelty of the question, and of its importance as
 “ possibly affecting the validity of the elections, and
 “ other acts of the new council, when completed,
 “ ordains the bill and answers to be printed, in order
 “ that the case may be reported to the Inner House

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“ as soon as possible—reserving consideration of the
“ interdict till the bill and answers are advised.

“ *Note.*—The Lord Ordinary does not think that he is
“ entitled to give an interdict de plano against the recep-
“ tion of any councillor, as that might perhaps suspend
“ the election of any new magistrates necessary to be
“ supplied, and all the other acts of the new council,
“ while such a proceeding might be attended with con-
“ sequences, in a populous community like Glasgow,
“ which cannot at present be anticipated.

“ But all parties will be aware that by the mere pre-
“ sentment of this bill the question as to Mr. M'Gavin's
“ eligibility is fairly mooted and rendered litigious; and
“ if the Court next week should grant an interdict par-
“ tibus auditis against Mr. M'Gavin's acting, a serious
“ question may arise as to the validity of any elections or
“ other corporate acts carried by his vote. Keeping that
“ contingency in view, the council will do well to confine
“ their proceedings to such acts as the police of the city
“ and the necessary business of the corporation require,
“ till the opinion of the Court is obtained, after a full
“ hearing of both parties on the bill and answers.”

Mr. M'Gavin, having been elected by a majority of the voters, was, on the 7th, declared by the chief magistrate duly elected, and received a written intimation from the town clerk to that effect. The bill of suspension and interdict was on the same day (the 7th) duly intimated, both to Mr. M'Gavin and the chief magistrate. On the following day Mr. M'Gavin attended in the town hall, and declared his acceptance of the office, and having taken the necessary oaths was inducted into the office of a town councillor.

Mr. M'Gavin objected to the competency of the bill,

on two grounds; 1, that the Court of Session had no jurisdiction in the matter; and, 2, that at all events the bill was too late, as he had been elected before it was intimated. On the merits he maintained, that as the act directed the municipal list of voters to be completed by the town clerk on the 16th September, it could not be affected by any judgment pronounced in regard to the parliamentary list by the Appeal Court in the ensuing month of October.

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On the 29th November 1837 their Lordships of the Second Division pronounced the following judgment:—
“Sustain the competency of the bill of suspension and
“interdict, but on the merits refuse the bill; find
“expenses due.”

Against this interlocutor, in so far as it had reference to the merits, Mr. Monteith and others appealed; and in so far as it sustained the bill of suspension and interdict, Mr. M'Gavin presented a cross appeal.

Appellants.—1. (As to the competency of proceeding by suspension and interdict.)—It is a general principle of law, that for every wrong there must be a judicial remedy. The legislature may restrain the remedy within certain limits, but it is not to be presumed that recourse to judicial tribunals is excluded where a wrong has been done. In the present case, if it is not competent to apply to the Court of Session for redress, there is no other judicial authority that can give it. The appellants do not complain of the judgment of the sheriffs; that judgment, they admit, is not subject to review of the Court of Session, but what they complain of is, that it has not been given effect to by the town clerk.

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The making up of the municipal lists has been committed to the town clerk of the burgh, and this he is to do "without requiring any claim or admitting any objection against the person so registered." If a wrong, therefore, is committed by him in doing so, there must either be a power of redress in the Court of Session, or the parties aggrieved have no judicial redress at all.

But as the Court of Session is a Court of equity as well as of law, it can interfere to prevent as well as to redress injuries; and the Court ought to prevent the party from violating the law, where they can do it, rather than first permit him to violate it, and then endeavour to give a tardy redress after perhaps irreparable injury has been committed.

An application by bill of suspension and interdict is the ordinary remedy by common law for stopping any illegal proceeding, and in particular any undue encroachment on legal rights. Indeed suspension and interdict is the only remedy now open. Under the old law there were certain statutes in force which gave a remedy by petition and complaint; but that remedy does not, either by its words or by its machinery, apply to the new law; and, accordingly, it has been found by the Court of Session that those statutory modes of procedure are now inapplicable.¹

It being thus clear that the Court of Session has jurisdiction, and that bill of suspension and interdict is the proper remedy, it is equally undoubted that the bill was not too late. The respondent had, it is true, been elected by the voters before the bill was intimated, but he had not declared his acceptance, or been in-

¹ Thomson and others v. the Magistrates of Wick, 8th July 1836, 14 D. B. & M., 1118.

ducted into the office till after it was intimated. The proceeding being therefore in progress, the intimation of the bill kept matters entirely open.

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2. (On the merits.) There can be no doubt that, on a proper construction of the first clause of the municipal reform act, the respondent was not a qualified elector. He had indeed claimed to be admitted as an elector to the parliamentary register, and his claim had been allowed by the sheriff, who originally considered it; but upon an appeal to the reviewing sheriffs that judgment was altered, and the claim was rejected. This was done before the 20th of October 1837, and his name was thereupon expunged from the parliamentary register, where it had only been inserted for a time, subject to the appeal that had been taken against his admission; therefore on the 7th of November, being the date of the election, his name did not stand on the parliamentary register. But the statute declares that those only who have been admitted to that register shall be qualified as municipal electors, and no person can be elected as a councillor who does not hold that qualification. This is confirmed by the circumstance, that in the case of burghs where there is no parliamentary list, the decision of the original court as to municipal electors is subject to review, and those persons only are qualified whose right is sustained by the court of review.

It is said that the 4th, 5th, and 8th sections change the interpretation and annul the effect of the first clause of the municipal act. But this is erroneous, for the town clerks lists may and should in each year exhibit the result of the judgments on appeal, in so far as these alter the judgments originally pronounced; and on the day of election in November

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the lists ought to contain the municipal portion of the parliamentary register, as ultimately completed, according to the latest judgments pronounced. Besides, supposing there is no authority in the municipal act for any alteration of the lists by the town clerks subsequent to the 16th of September, so that thereby those lists are not affected by the judgments on appeal, still this defect in the machinery of the act will not overrule the leading declaration of the statute as to the franchise; and consequently a party, even though remaining on the municipal lists, will be disqualified from voting in November, if he has been struck off from the parliamentary register in the intervening month of October.



The case of Orr against Vallance is no authority to the contrary, as it was decided prior to the passing of the late act, and Mr. Vallance had actually been inducted and filled the office before the bill was intimated.¹

Respondent.—1. (Competency of the bill.) Supposing that any right of review of the proceedings of municipal elections exists in the Court of Session, it can only be competent by an action of reduction and declarator. The whole tenor of the bill of suspension and interdict shows that the merits of the election are directly put in issue; and in consequence the Court below must, in the form of a suspension and interdict, if it were competent,

¹ Orr, 2d Dec. 1831, 10 S. D. 93; Buchney and others v. Ferrier, 10th March 1753, Mor. 1854; Dalrymple v. Stodart, 7th August 1778, Mor. 1861; Chalmers v. Magistrates of Edinburgh, 24th July 1782, Mor. 1863; Magistrates of Anstruther Wester, 29th June 1819, Fac. Col.; Provost of Glasgow v. Abbey, 3d December 1825, 4 S. and D., 270 (new ed. 271); Watson v. Commissioners of Police, 10th March 1832, 10 S., D., and B., 481.

try and determine the validity of the election ; for before they could arrive at the conclusion that the application was competent, they must hold that the election of the respondent ought to be set aside, because otherwise the appellants could have no right to maintain that he ought to be interdicted from encroaching upon their rights by acting as a councillor.

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There is a long series of precedents which establishes the incompetency of the mode of procedure by suspension and interdict, while there is no case which can justly be deemed adverse. The cases on the subject of review in election questions appear to amount to ninety-two, commencing with that of *Milne v. Reid*.¹ Of these about twenty were actions of reduction, or of reduction and declarator, which, although scattered throughout the whole period, are more numerous towards the commencement of it; in about sixty-five cases the procedure was by petition and complaint²; and in five the precise form is not shown by the reports, but apparently it was reduction or complaint; in one there was a suspension and reduction conjoined³; and in another there was a suspension resorted to as the form for reviewing the decision of a town council vested with powers of an inferior judicatory; but no case has been discovered in which the procedure was by suspension and interdict.

A suspension and interdict was for the first time attempted in the case of *Orr v. Vallance*, 2d December 1831, and the Court of Session decided that it was incompetent, and that the proceedings could be chal-

¹ May 1723, Robertson's Appeal Cases, p. 452.

² Under Stat. 7 Geo. II. c. 26.

³ *Buchney v. Ferrier*, 10th March 1753, Mor. 1854.

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lenged only in the form of a petition and complaint or reduction; and the rule thus laid down was subsequently referred to and approved of in the case of *Watson v. the Commissioners of Police of Glasgow*.¹

But supposing that the remedy of suspension and interdict was competent, still it was too late in being resorted to. Such a proceeding is only competent where the matter complained of is in progress. But the election of the respondent was complete before the bill was intimated. It is true he had not taken his seat as a councillor before that time, but this cannot affect the completion of the election.

2. (As to the merits:)—The most important object, next to the creation of the franchise, contemplated by the legislature, in conferring upon the royal burghs a new municipal constitution, was the adoption of a simple and decisive method of making up and completing the list of electors. Elections were to take place annually, and to be finished in one day, and upon the succeeding day the result of the poll was to be declared; the councillors elected were thereafter to declare whether they accepted or declined to accept the office, and persons failing to attend were to be held as having declined. And in strict conformity with the object and spirit of the statute, it is enacted, that a list of the municipal electors shall be made up and completed by a day specified; that it shall remain without alteration; that it shall form the basis of the right of electing and

¹ 10th March 1832, 10 S. & D. 481. See also *Drysdale v. Magistrates of Kirkaldy*, 10th June 1825, 4 S. & D. 658; *Banks and Co. v. Jeffrey and Co.*, 4th July 1792, Mor. 9384; *Chalmers v. Magistrates of Edinburgh*, 24th July 1782, Mor. 1863; *Gray v. Magistrates of Anstruther Wester*, 29th June 1819, Fac. Col. No. 234. p. 761.

being elected, and of the right of examination into the affairs of the municipality.

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The town clerk is appointed to be the custodier of the list of electors. The mode in which he is to deal with it is distinctly specified, for he is to correct and complete it on or before "the 16th day of September," by adding the names of those who before that date shall have been inserted in the register since it was made up in the previous year. When the list shall thus have been made up and completed, it becomes on the 16th of September a final and closed record.

Where an enactment is directory, the persons who are to fulfil its injunctions must literally obey it; for a person possessing a ministerial character only cannot construe or otherwise deal with the statute by which his powers are created, and by which they must be measured. In consequence, the town clerk, in correcting the municipal list under the 5th section of the statute, must take the act of parliament for his sole guide. He must complete his duty on or before the 16th of September, after which he is *functus officio*.

Throughout the whole of the enactments relative to the right of electing and being elected, the list completed by the town clerks on the 16th of September forms the only rule. The phraseology is, "foresaid list or roll," which leads back, by necessary inference, to the 4th and 5th sections embodying the description of that list or roll. No other criterion is or can be in existence; and according as the name of a person shall or shall not be found in that list, he has or has not the statutory qualification to elect or be elected. According to that list the votes are to be taken; and so conclusive is it, that it shall not be competent at

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the poll to inquire into any other facts but the identity of the person mentioned in the list, his still holding the qualification there mentioned, and his not having previously voted at the same election; which facts can be proved only by his oath, if required by any other voter on the roll.

LORD CHANCELLOR.—My Lords, I am anxious to draw your Lordships attention to this case, or at least to one of the appeals in this case, because, as it involves the question in certain cases of the right of election in the burghs in Scotland, and as those elections must take place before the next session of parliament, it might be very inconvenient that the question which has been discussed at your Lordships bar should remain undecided till the following session.

My Lords, the case arises upon the election in Glasgow of Mr. M'Gavin, who was upon the parliamentary list of electors on the 16th of September; but between the 16th of September and the time of the election of the burgh officers his name had been erased from the parliamentary list by an appeal which is provided for by the reform act for Scotland. When the election of burgh officers took place, the objections were made that he was no longer qualified to be elected, inasmuch as his name had been at that time struck off the parliamentary list. The election, however, proceeded, and he had a majority of votes. After the act of election, but before he was completed in his office by taking the oaths, a bill of suspension and interdict was presented to the Court of Session for the purpose of preventing the completion of his election, and for the purpose of preventing him from acting as such town councillor.

The Lord Ordinary very properly refused to interfere by interdict, seeing the consequences to which that might lead. In consequence of that interdict being refused Mr. M'Gavin was completed in his office.

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My Lords, when the case came before the Court of Session two questions were raised. The first, as to competency, namely, whether the Court of Session was competent to entertain a bill of suspension and interdict under the circumstances of the case ; and if the Court were of opinion that they were competent, then whether, according to the facts which the Court were bound to assume for the purpose of decision in that stage of the suit, the case was such as to entitle the complainers to the remedy for which they prayed. The Court of Session were of opinion that they were competent ; but, upon the merits, they were of opinion that they ought to decide against the complainers.

My Lords, against that decision the first of these appeals was presented, namely, upon the merits. The respondent in the case then presented his appeal, namely, an appeal against the decision of the Court of Session, deciding that they were competent to entertain that suit. That second appeal was presented provisionally, inasmuch as it would only become necessary for Mr. M'Gavin to resort to that appeal, and to raise that question, in the event of your Lordships being of opinion that the Court of Session were wrong upon the merits ; and then of course it would be necessary for him to show, if he could, that the Court of Session were not competent to entertain that suit.

My Lords, the question upon the first of these appeals is the one that presses for decision, inasmuch as it touches the rule by which the elections are to be

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conducted in the ensuing autumn, and that turns entirely upon the construction of two acts, or perhaps three acts, namely, the two acts regulating the election of municipal officers, and also the reform act of Scotland. The real question is this, whether the list of burgh electors, which by the act is directed to be made out on the 16th of September in every year, is or is not a final or conclusive list by which the elections are to be regulated in the following month of November; or whether the burgh list so made out in the month of September is or is not to be corrected, by having transferred to it any correction that may take place in the parliamentary list of electors which may happen between the 15th of September and the 25th of October in one of those years.

Now, I have only to call your Lordships attention to some, and not many, of the sections of those two acts. The municipal reform act, 3 & 4 W. 4. c. 76., enacts, that the electors shall be such only as are qualified to vote in the election of a member of parliament for such burgh by virtue of an act passed in the second and third year of the reign of His Majesty King William the Fourth, intituled "An Act to amend the representation of the people in Scotland," and as are duly registered as such voters in the registers by the said recited act appointed to be kept.

That section has been much relied upon. It has been contended that the provisions of that section cannot be carried into effect if any person is permitted to vote in the election of municipal officers who is not qualified to vote in an election for a member of parliament. But it is to be observed that that is only one of the qualifications required, because the section goes

on to provide that they must be duly registered in the register by that act appointed to be kept; and the real question is not, whether they are de facto qualified to vote in the election of members of parliament, but whether this section has not provided a test by which alone inquiry can be made whether they are or are not duly qualified.

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Then, my Lords, the fourth section directs that the town clerk shall on or before the 16th of September make up and complete a list or roll of persons entitled to vote in the election of the common council of such burgh in manner following; viz.—“The town clerk of
“ each burgh which by virtue of the said recited act
“ sends, either severally or in combination with any
“ other burgh or burghs, a member or members to
“ parliament, shall make up and complete such list by
“ transferring from the parliamentary register for such
“ burgh to such list or roll the names of all the voters
“ contained in such register entitled to vote in the
“ election of a member of parliament as are so regis-
“ tered in respect of properties situated within the
“ royalty, whether original or extended, of such burgh,
“ without requiring any claim or admitting any objec-
“ tions against the persons so registered.”

That section contains very specific directions. It fixes a particular day, the importance of which your Lordships will see when I come to the parliamentary reform act. It fixes the 16th of September as the day on which the town clerk is bound to look at the parliamentary register, of course as it exists on that day; and his sole duty is to transfer from that parliamentary list into his burgh list the names of all such persons who, upon the face of that parliamentary list, are entitled to

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vote in the election of members of parliament. And it is expressly provided that he shall exercise no discretion, that he shall not consider any claim or look to any objection, but confine his duty to merely transferring from the one list to the other the names of the persons found on that day upon the parliamentary list.

Now, what does the fifth section provide? Having directed that the town clerk is to make his list upon the 16th of September, the next section provides what he shall do with the list so made up. Each town clerk shall keep his list in the town clerk's office. Now, it is said by the appellant in the first appeal, that he is to correct this list from time to time, to vary and alter it according to the alteration in the parliamentary list. This section, after directing him to keep the list, says that he shall annually correct and complete his list on or before the 16th of September. How is he to do this? He is to do it annually on or before a particular day in each year, and he is to do it by removing therefrom the names of such as may have died, and adding the names of those who may have been inserted in the register appointed by the said recited act (which is the reform act), since it was made up in the previous year. Then he is on the 16th of September in each year to take the list which he had completed on the 16th of September in the previous year, and to correct it by omitting the names of those who are dead, and by making such alterations as may have been made in the parliamentary list since it was made up in the preceding year; a provision which appears utterly inconsistent with that which is contended for on the part of the appellants, namely, that he is not to do this for the

purpose of completing his list on the 16th of September in every year, but to do it from time to time as alterations may be made on the parliamentary list.

Then the eighth section provides, "that upon the
 " first Tuesday in November the electors qualified and
 " entered in the list or roll made up as aforesaid shall
 " elect, from and amongst the persons contained in the
 " list or roll of the whole electors for such burgh, the
 " councillors for such burgh, by open poll; and it shall
 " not be competent at such poll to inquire into any
 " other facts but the identity of the party tendering a
 " vote and the person mentioned in the list or roll, his
 " still holding the qualification there mentioned, and
 " his not having previously voted at the same election."

Now, the elections are, in express terms in that section, to take place according to the list made up as aforesaid. And looking at the previous sections in the act, there is no list made up as aforesaid, except the list made up on the 16th of September in each year, by transferring from the parliamentary register to the burgh lists the names of those qualified to vote for members of parliament. Now, it appears to me to be clear, in the first place, that this list is to be made up from the then existing parliamentary list; that there is no power in the town clerk to make any alteration, except when he comes to make out the list for the succeeding year; and that the alteration in the parliamentary list between the 16th of September in one year and the 16th of September in the following year are not to be regarded till making up the list for the following year; and that the elections to take place in November are to proceed upon the list so made up upon the 16th of September.

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My Lords, if that be so, it only remains to be inquired, (and that is to be ascertained by looking at the reform act,) what was the list that did exist on that day, namely, the 16th of September, when the town clerk was directed to transfer from the parliamentary list to the burgh list the names of persons entitled to vote? The act provides, that for the purpose of making out the parliamentary list (I am at present confining myself to those parliamentary burghs), all the claims and objections shall be laid before the sheriff on the 12th of August, who is to decide upon the same on or before the 15th of September, the day immediately preceding the day on which the town clerk is directed to go and see what names are to be found upon the parliamentary list; that then he shall correct any errors or omissions which may be pointed out; that he shall have his register finally corrected and completed on or before the 15th of September in every year; and that after that day no alteration shall be made but in consequence of the judgment of some court of law.

The 23d section provides, that any party who may complain of the decision of the sheriff may, upon notice within five days after the judgment of the sheriff, appeal. The 25th section provides, that the Court of Appeal is to sit between the 15th and 25th of September, and finally to determine on all appeals on or before the 20th of October. Then it provides for the mode in which any alterations made upon appeal are to be carried into effect, so far as respects the parliamentary list, that the sheriff, upon the judgment of the court of review, being made known to him by the parties, is to alter and correct the parliamentary register

accordingly ; so that all elections are to proceed upon the list as completed before the date of the alteration.

My Lords, from the provisions of this act it appears to me clear that the parliamentary list from which the burgh list is to be made up on the 16th of September is the list as settled by the sheriff on the 15th of September ; that any alterations in the parliamentary list afterwards made are to be inserted in the burgh list of the next year, but are not to affect the burgh list as made up on the 16th of September ; and that the elections in November are to proceed upon that list.

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It was urged in argument, that although there is no express provision in the act for making those corrections in the burgh list, it must necessarily be inferred that the legislature so intended, because it has in another case provided for appeals by which the burgh list may be corrected, namely, in burghs which are not parliamentary. It does appear to me that that affords the strongest possible argument the other way, because when parliament provides for a particular mode of proceeding in one particular case, and makes no such provision in another case, it must be assumed that that is not mere negligence or inattention in the framers of the act, but there is some ground for the distinction between the two cases.

Now, does not a distinction exist between the two cases. In the burghs not parliamentary there is no list to resort to ; it is to be made in the first instance by the officer of the town ; and, inasmuch as it may be incorrect, the parties are entitled to a more solemn adjudication upon their rights, and therefore from the first list so made there is an appeal given. But in parliamentary burghs you have the parliamentary list to refer to first,

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which has gone through all the operation which the list of burghs not parliamentary has under the act to go through, namely, the claims have been brought under investigation by the sheriff, and the final settlement and correction of that list has taken place on or before the 15th of September in each year. It is therefore putting the claims identically upon the same footing in point of principle, though not the same in point of form; and in the first set of cases, namely, in parliamentary burghs, the list passes through the Court of the Sheriff; in the cases of burghs not parliamentary it goes through another mode of investigation. In both cases the list upon which the elections are to take place is a list that has undergone the operation of revision in the first instance, and if necessary, of subsequent appeal.

My Lords, a question was raised which, in the view I take of the case, if your Lordships should concur in that view, it will not be material to consider, namely, that although there is no power given to the town clerk to correct this list, it was competent to the Court of Session to order it. If I am right in the construction of this act it is immaterial to consider that question, because I am clearly of opinion that the election took place according to the right list. And if the Court of Session had the power of investigating the validity of the claims of the electors, and consequently the qualification of those to be elected, the Court of Session must have come to the same conclusion; and it is immaterial, therefore, to consider whether the Court of Session have or have not the power of correcting any error that appears upon the list, inasmuch as, according to the construction I put upon this act, there is no

error in the list for the purpose of regulating the election that took place.

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My Lords, that being the view I take of the original appeal, it will be sufficient if your Lordships concur in the view I take to dispose of all that portion of these two appeals which is at all pressing in point of time. And I apprehend it will not be necessary for your Lordships to come to any conclusion as to the provisional appeal, namely, the appeal presented by Mr. M'Gavin. It was presented only in contemplation of the possibility of your Lordships delivering an opinion contrary to that of the majority of the Court of Session, who are in favour of that which appears to me to be the true construction of these several acts. No question as between the parties depends upon the second appeal, if your Lordships concur in the view I now take; nor is there any question in point of costs, because, looking at what took place below, and looking at the difficulty of parts of the case, I think that whether your Lordships affirm or reverse the judgment of the Court of Session below, it is not a case in which your Lordships would be justified in giving costs on either side.

I am desirous, therefore, of avoiding saying much upon the subject of that second appeal; but I think it right to say this much, that if there be difficulty upon the question of competency, it is a difficulty which I cannot but think your Lordships are not very likely to solve; because, even if such a suit be competent, it is not easy to conceive a case in which the Court could exercise a sound discretion in acting upon that power, either by interdicting an election which actually is in progress from taking place, or by interdicting the party

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elected from exercising the duties of his office in a proceeding in which the Court has not the power of declaring the office void, and therefore enabling the parties to proceed to a new election. It is not a proceeding in which the Court of Session can do that; the extent of their power would be to prevent one man performing the duties of the office without having the means of putting another person in his place.

The Lord Ordinary felt the danger which might arise from his interfering by interdict. And with great judgment and propriety, although the competency of the suit was maintained, he refrained from exercising the power of the Court of interfering by interdict.

My Lords, there certainly appears to have been a material error in an assumption made in the discussion of this matter in the Court of Session, namely, that in this country any such power exists in the way of interdicting or preventing the election of officers before the election takes place. Ample power exists for the purpose of correcting an erroneous election; but for the purpose of interfering before the election takes place, there is no power exercised by the Court of Queen's Bench in this country. If the Judges of the Court of Session, in coming to a decision upon the question of competency, were at all influenced by the supposition that such jurisdiction is exercised in this country, it may be right that they should re-consider their view of the case, if any other question of this sort should come before them. They are the best judges, in the first instance, of how far their Courts are competent to decide upon that point. But if they at all come to that decision upon any supposed analogy between the juris-

diction which they were called upon to exercise, and a jurisdiction of that kind supposed to exist in this country, it is proper that they should inform themselves accurately upon that subject, before they act upon any such analogy. I am satisfied that they will take an opportunity of doing so, if the case should again occur.

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The Court of Session have ample power, as the Court of Queen's Bench has in this country, of investigating the legality of elections of this description, and setting those aside which may have been made contrary to law; a more wholesome mode of proceeding, undoubtedly, as the Judges of that Court will probably feel, than by proceeding before the election is completed to prevent its taking place, the consequence of which may be, that the town may be left entirely without its municipal officers during a suit, which may and probably will last longer than the period for which those municipal officers were to be elected.

My Lords, I do not go further in that cross appeal. It is not at all material to the interest of the parties that your Lordships should ever give any opinion upon that mere speculative question; for if your Lordships concur in the view I take, it is a mere speculative question, how far that competency may or may not exist in a case where it becomes perfectly immaterial in consequence of a decision against the pursuer upon the merits; but if it should come to be a material question it would require, in my view of the case, very serious consideration. At present, therefore, I shall move your Lordships to affirm the interlocutor which is the subject of the first appeal. Of course there being a majority of the Judges one way, and one Judge

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the other, it is not a case in which your Lordships would think it right to give any costs.

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The House of Lords ordered and adjudged, That the said original appeal be and is hereby dismissed this House, and that the several interlocutors, as far as therein complained of, be and the same are hereby affirmed.

DEANS & DUNLOP—ARCHIBALD GRAHAM, Solicitors.

[25th July 1838.]

ABRAM WILDEY ROBARTS, Esquire, Banker in London,
Appellant and Respondent.—*Pemberton—Wigram—
Purvis.*

JOHN COURT, Common Agent for the Creditors of
LEWIS CUTHBERT, and THE TRUSTEES of the deceased
ROBERT BOGLE and others, creditors of the said
LEWIS CUTHBERT, Respondents and Appellants.—
Dr. Lushington—Bailey—Currie.

Interest.—A party, pending a discussion as to the rate of interest for which he was liable on trust funds in his hand, consigned in Court a sum as the full amount of principal, and interest at four per cent., and he was afterwards found liable in five per cent. :—Held (affirming the judgment of the Court of Session) that he was bound to account for interest on the sum short consigned, and that an objection that this was a charge of interest on interest did not apply, seeing that the consignment was not definite, the question as to the rate of interest being undecided.

Agent and Principal.—A party who held, in trust for himself and another, an heritable security over the estate of his debtor, and was appointed one of his testamentary executors, and at the request of other creditors, agreed, with a view to save expense, to receive the proceeds of the debtor's estate, and distribute the same, without making any stipulation for commission:—Held (affirming the judgment of the Court of Session) not entitled to commission.

LEWIS CUTHBERT, resident in Jamaica, purchased
in 1780 the estate of Castlehill, in Inverness-shire, at

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the price of about 14,000*l.* sterling. Beside other employments in Jamaica, he farmed and held the office of provost marshal of the island, from Lord Braybrooke, the patentee thereof, at the yearly rent of 2,000 guineas, under a lease which was current till 24th December 1807. Abram Robarts, banker in London, was the consignee and correspondent of Mr. Cuthbert in England, and became his creditor for a large sum of money. He was also bound as his surety to Lord Braybrooke for the rent of the provost marshal's office. For Mr. Robarts's relief of this cautionary obligation Mr. Cuthbert, in 1793, executed in his favour a deed of indemnity in the English form, by which he also became bound to pay to Mr. Robarts 200*l.* per annum during the lease, as a commission or premium for undertaking the risk and trouble of paying the rents, and taking the management and charge of the consignments of sugar and other goods which Mr. Cuthbert should make to England for the purpose of paying these rents.

On the 27th May 1795 Mr. Cuthbert, for Mr. Robarts's further security, as well in regard to his cautionary obligation as his engagements in general, executed in his favour a disposition of his Scotch estate of Castlehill, bearing to be *ex facie* absolute, for a price of 18,000*l.* actually paid, but, in truth, as a security and trust. Mr. Cuthbert was also indebted to Mr. Tierney, and he declared that Mr. Robarts should hold the estate for behoof of Mr. Tierney, as a postponed creditor.

Mr. Robarts was duly infeft, and the instrument of sasine was recorded on the 9th July 1796.

The transactions between Mr. Cuthbert and Mr. Robarts continued until Mr. Cuthbert's death, which

happened in October 1802, at which time the balance upon the accounts between them somewhat exceeded what was due to Mr. Robarts at the time of granting the disposition, and Mr. Robarts remained bound for the punctual payment of the rent of the provost marshal's office till 24th December 1807.

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Mr. Cuthbert left a will, under which he appointed his son Mr. George Cuthbert, Mr. Robarts, and others, his executors and trustees, with authority that they should, as soon as conveniently might be after his decease, sell the said estate of Castlehill; and he also "gave and bequeathed all his real and personal estate in England and in Jamaica, and all his personal estate in Scotland, to the said George Cuthbert, Abram Robarts, and others, their heirs, executors, administrators, and assigns, upon trust as to every part thereof, except his Mr. Lewis Cuthbert's lease of the office of provost marshal of the island of Jamaica, to sell and dispose of the same as speedily as possible after his decease, and in the most advantageous manner for his estate, and to lay out and invest the monies arising therefrom, and also the monies to arise from the sale of his Mr. Lewis Cuthbert's lands and real estate in Scotland, in the public funds, or on any good security in Great Britain, for the purposes of his said will." One of these purposes was the payment of his debts. Mr. Robarts accepted, and acted under the deed.

Immediately thereafter Mr. Robarts entered into possession of the estate of Castlehill, and employed Mr. Campbell Macintosh as his agent, and he proceeded to sell the property in lots by public roup. In this way he realised, in 1804 and 1805, 29,170*l*.

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In the latter year Mr. Tierney and other creditors of Mr. Cuthbert charged Mr. Cuthbert's eldest son to enter heir, and took steps for recovering payment of the debts, by executing actions, arrestments, and inhibitions.

In this state of matters a meeting of the agents for Mr. Robarts, the representatives of Mr. Cuthbert, and the whole creditors who had then appeared, was held at Edinburgh on the 1st August 1806; when they declared it to be their opinion,—

“ 1st. That Mr. Robarts should proceed with the
“ sale of those parts of the estate of Castlehill which
“ remained unsold:

“ 2d. That no creditor should take any farther step,
“ by adjudication or otherwise, to interrupt that mea-
“ sure, unless some other creditor who has not hitherto
“ appeared shall proceed to adjudge; in which event,
“ if possible, one general adjudication for the creditors
“ who appear by their agents at this meeting would
“ seem to be the least expensive mode of procedure for
“ obtaining a *pari passu* preference for the whole:

“ 3d. That it is not the opinion of this meeting that
“ any of their constituents will object to Mr. Robarts's
“ claims of preference, or to their amount, if it appears
“ from the accounts that they are all contracted on the
“ *bonâ fide* understanding of the security, by the dis-
“ position and infestment in favour of Mr. Robarts,
“ who will, through his agent, favour the agents for
“ the other creditors with a statement of his accounts
“ and claims, and the dates of the different contractions:

“ 4th. The meeting are of opinion it would be for
“ the benefit of the creditors whom they represent, or

“ others who may appear and concur with them, to
 “ appoint a proper person, with powers of an arbiter,
 “ to settle the amount of their respective claims, and
 “ their order of preference, and award payment out of
 “ the reversion of the price of the estate, after dis-
 “ charging Mr. Robarts’s and the other preferable debts;
 “ and agree to recommend such measures to their
 “ respective constituents, and to suggest Mr. Francis
 “ Farquharson of Haughton, accountant, as a proper
 “ person to act as arbiter :

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“ 5th. That Mr. Robarts be requested to take the
 “ trouble of receiving the prices of the lands sold and
 “ to be sold, and of paying the same, agreeable to the
 “ awards that may be given by the arbiter, not doubt-
 “ ing that he will allow interest thereon after the rate
 “ of 5 per cent. per annum, so far as the said prices
 “ shall not be exhausted by payment of his own and
 “ the prior preferable debts :

“ 6th. That the meeting shall recommend to their
 “ respective constituents not to allow their inhibitions
 “ and other diligence to prevent the sales being made,
 “ or the prices being paid to Mr. Robarts; and for that
 “ end, to concur, if required, in any deeds that may be
 “ thought necessary: And,

“ Lastly, That such of the creditors as have not
 “ already constituted their debts may do so, notwith-
 “ standing any thing herein contained.”

Certain parcels of land were accordingly sold in De-
 cember 1807 and in March 1808, and the total prices
 realised by all the sales amounted to 52,321*l*.

In the meantime Mr. Farquharson, the proposed
 arbiter, died; and new claimants upon the fund

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having come forward, Mr. Robarts, in January 1808, raised a process of multiplepoinding and exoneration before the Court of Session.

After the usual procedure, the Lord Ordinary, on the 18th June 1808, remitted to Mr. Charles Ferrier, accountant in Edinburgh, to audit and examine the accounts and claims of Mr. Robarts, and his factor and agents, and of the several creditors and claimants on the fund, and to report a state of the whole, with his opinion thereon.

Pending this remit Mr. Robarts proceeded in the recovery of the prices and interest; and it having appeared that the fund in medio would be about equal to the debts, and that it would be advisable to make an interim payment, among the creditors then entitled, and in a situation to receive and discharge, leaving Mr. Robarts's accounts, and those of the factor and agents, to be considered when the business of the trust drew nearer to a conclusion, a minute was given into process, mentioning that there was a fund in medio of 35,305*l*; and it was therefore craved, that the Lord Ordinary would remit to Mr. Ferrier to make out an interim scheme of division, at the rate of ten, or twelve, or of fifteen shillings, or such other rate per pound as, in his opinion, might be done with safety to the general interest, upon the creditors claims. A remit was accordingly made to Mr. Ferrier, who submitted an interim report and scheme of division, by which, after setting aside a sum sufficient to answer the amount of the debts due to Mr. Robarts himself and Mr. Tierney, there was allocated a dividend of 10*s*. in the pound on the whole other claims lodged, as at 1st September

1809, with interest thereafter, at the rate of 4½ per cent. without deduction of property tax. On advising this report the Lord Ordinary (Cringle) pronounced the following interlocutor on the 6th December 1809:

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—“ Approves of the said report and interim scheme of division, and in the meantime ranks and prefers the creditors therein, in terms thereof, and decerns in the preference, and against the raiser of the multiplepoinding, for payment to such of the creditors to whom dividends are thereby allocated now to be paid, of their respective dividends accordingly, and that against the 20th day of December current; with interest thereafter at the rate of 4 per cent., without deduction of the property tax, till payment: But with regard to the dividends corresponding to the debts claimed by the other creditors, and proposed by the said interim scheme of division to be set apart and retained, finds, that the same must be retained for the present by the raiser of the multiplepoinding, bearing interest in like manner at 4 per cent., without deduction of the property tax.” This judgment was acquiesced in, and was extracted; and the interim dividends allocated for payment, amounting to 11,182*l.* 19*s.* 1*d.*, were paid to the respective creditors therein.

Various proceedings then took place before the accountant as to the verification of the claims, during which an obstacle arose to any farther payments being made by Mr. Robarts, in consequence of certain investigations set on foot by the House of Assembly of Jamaica. It was discovered that Mr. Cuthbert, while provost marshal of Jamaica, had incurred considerable

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arrears or balances on money deposited in that office. Lord Braybrooke, the patentee, being liable to the suitors for these deficiencies, claimed relief from Mr. Robarts as surety for Mr. Cuthbert. Mr. Robarts therefore declined making any farther payment till a settlement of these claims should be effected. His right to retain the fund in medio was, however, disputed by one of the creditors, Mr. Cruickshank; but both the Lord Ordinary and the Inner House, on the 3d March 1815, sustained the claim of retention, and found that in hoc statu no decree can go out for any farther payment to Mr. Cruickshank, and decerned accordingly.

All farther proceedings in the process were thus arrested till Mr. Robarts should be relieved of the claims made on him for the balances due from the provost marshal's office. In the meantime he died, and in 1816 the process was transferred against Mr. Abraham Wildey Robarts his son and executor. Ultimately an arrangement was accomplished, by which the patentee of the provost marshal's office agreed to accept of the sum of 7,000*l.* in full of all claims under Mr. Robarts's suretyship; and the creditors having authorised Mr. Robarts's son to settle the matter accordingly, and to make payment of the 7,000*l.* out of the funds arising from the sale of Mr. Cuthbert's estate, that sum was paid in 1823, and the cautionary obligation discharged.

Proceedings were then resumed in the multiplepoinding. The interim dividends formerly decerned for in favour of certain of the creditors, but which had remained unpaid, were now paid under a warrant to

that effect; and the Lord Ordinary, on the 10th of March 1824, renewed "the remit to Mr. Charles Ferrier, accountant, to make up and report a state of the claims and interest, and of the trustees accounts, and those of his factors and agents, and of the balance of the fund in medio, and final scheme of division thereof among the claimants, the creditors and representatives of the deceased Lewis Cuthbert, according to their respective rights and interests."

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Thereafter on the 21st of January 1825 his Lordship appointed Mr. Robarts's son to give in a condescendence, signed by himself, of the funds in medio, and interest thereon, reserving all questions as to the rate of interest. A condescendence of the fund as at 15th May 1825 was accordingly lodged, which was remitted to the accountant.

In the meantime, besides the prices and rents of the estate of Castlehill, Mr. Robarts about the year 1805 had recovered a sum of 4,879*l.* in England from the sureties of William Welby Vaughan, in the provost marshal's office, on account of deficiencies for which Vaughan was liable; and certain proceedings were adopted by the creditors of Mr. Cuthbert against Mr. Robarts relative to this money in the Court of Chancery in England. Eventually an arrangement was made under which these proceedings were dismissed; and an order having been pronounced in the multiplepounding for consignment, Mr. Robarts's son, on the 18th June 1828, consigned in the bank of Scotland the balance admitted to be due by him, arising out of the prices and rents of Castlehill; and the Lord Ordinary, on the 8th July, appointed him to give in a condescendence of the amount of the English

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funds, which he did, and it was remitted to the accountant.

The main points in dispute before the accountant related to,—1st, the interest chargeable against Mr. Roberts on his intrusions with the rents and prices of Castlehill; 2dly, the interest on the dividends of which the payment was suspended during the proceedings in Chancery; 3dly, a deduction of property tax for the interest during the subsistence of that tax; 4thly, a claim of commission by Mr. Roberts; and, 5thly, the interest on the English (or Vaughan's) fund.

The accountant reported:—1. “ That in regard to
“ the rate and accumulation of interest, Mr. Roberts
“ acted as trustee for the creditors and holder of the
“ funds in medio. Had he been acting as consignee
“ and holder of the fund in medio, under authority of
“ the Court, he would have been liable for the interest
“ he received on the monies invested by him, or
“ employed and placed out at interest; while, as trustee
“ again, he was not entitled to make profit by the use
“ of the trust funds, and must be held to have placed
“ them out beneficially as they came into his hands.
“ He indeed received the custody of the funds without
“ the formal intervention of the Court, but in doing
“ so he must be presumed to have acted on the under-
“ standing that due attention should be paid to the
“ interests of the trust estate in the employment of the
“ money, and ought, therefore, it is thought, to account
“ for the interest actually received by him, with ac-
“ cumulations or rests, as observed in like cases. It is
“ alleged that the funds were de facto (as discovered in
“ the Chancery proceedings) lodged in the banking

“ house of Robarts and Company, and interest allowed
 “ thereon at five per cent., balancing annually ; and this
 “ is the usual mode with London bankers in the case
 “ of such accounts. If the money was not so lodged,
 “ and if Mr. Robarts does not choose to state in this
 “ process how it was employed and cared for by him,
 “ he must be charged with interest at five per cent.,
 “ balancing annually.”

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2. “ With regard to the interest on the sum retained
 “ for the dividends, it may at first seem that the inter-
 “ locutor of December 1809 should form the rule,
 “ since it was pronounced in particular relation to
 “ them. That interlocutor, however, was pronounced
 “ on the supposition that the dividends were to be
 “ paid, most of them immediately, and the others so
 “ soon as the objections stated to them, and then in
 “ the course of discussion, should be determined, and
 “ it was not contemplated that they were to remain so
 “ long unpaid. Mr. Robarts argues, indeed, that they
 “ were subject to the orders of Court, and liable to be
 “ consigned on the application of any creditor ; but it
 “ must be observed that in March 1815 he was still
 “ found entitled to retain all the dividends then unpaid,
 “ till relieved of his cautionary engagements for the de-
 “ ficiencies in the provost marshal’s office. In these cir-
 “ cumstances it is thought that interest should be stated
 “ on the sums applicable to these dividends, the same as
 “ on the other funds. It may be very just only to allow
 “ those creditors to draw four per cent. whose claims
 “ had still to undergo discussion subsequent to the period
 “ of division ; the other creditors, and the party having
 “ the reversionary interest in the funds, being put to

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“ expense in the adjustment of the claims. But this
“ should not affect the question between Mr. Robarts
“ and the general creditors, and the party claiming the
“ reversion, as to the mode of stating the general ac-
“ counts of the trust. In point of fact, however, on
“ this branch of the case Mr. Robarts is allowed credit
“ in the state of accounts now reported for the sum of
“ 11,182*l.* 19*s.* 1*d.*, being the total amount of the
“ undisputed dividends as on 20th December 1809,
“ the day of the division; and as in paying those cre-
“ ditors as they came forward to him with their dis-
“ charges he only allowed them four per cent. interest,
“ he has thus so far got effect given to his plea.”

3. “ According to a received rule during the ope-
“ ration of the property tax a person, whether a banker
“ or otherwise, seeking payment of a debt in a court of
“ law, or in a competition with creditors, was bound to
“ allow property tax, and therefore it is proposed to
“ deduct the property tax on the annual interest charged
“ on Mr. Robarts’s claims.”—“As to the property tax on
“ the intromissions, it is believed that bankers, in the
“ business done in their houses, neither allowed pro-
“ perty tax on interest paid them, nor did they deduct
“ it on interest allowed by them; and probably Mr. Ro-
“ barts was allowed five per cent. from Robarts and
“ Company, without deduction of the tax. But as it
“ is proposed to strike the accounting in this case on
“ the assumed legal profits of five per cent. per annum,
“ it is also proposed to allow deduction of the property
“ tax on all the interest stated against Mr. Robarts in
“ his account of intromissions with the trust fund.”

4. “ In the outset Mr. Robarts’s object was to sell,

“ and pay his own debts, and for relief of the obli-
 “ gations he had come under respecting the provost
 “ marshal’s office. Latterly, however, he became, at
 “ the request of the creditors, their trustee, and agreed
 “ to proceed in the sales, and act for them and the
 “ heirs of Mr. Cuthbert. The profits, or presumed
 “ profits, therefore, arising upon the employment of
 “ the trust funds being brought to account, Mr. Ro-
 “ barts may be allowed a commission of two and a half
 “ per cent. upon the gross sums received by him, and
 “ a commission of a half per cent. on the annual pro-
 “ ceeds and for paying and applying the same, exclu-
 “ sive of the commission and allowances to the factor
 “ and agent in Scotland in respect of the lotting of
 “ the estate, sales thereof, and recovering and remitting
 “ the rents and prices. But as Mr. Robarts, down to
 “ August 1806, acted for the recovery of his own debts
 “ and engagements, and has, in his accounts, a fixed
 “ commission or allowance of 200*l.* per annum down
 “ to 31st December 1807, at which time his own debt
 “ was extinguished, the above commission is only
 “ allowed on the sums recovered by Mr. Robarts, after
 “ deducting the amount of his own debts.

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And 5. As to the English fund, or Vaughan’s money,
 the accountant stated that “ he proposes to follow
 “ the same rule that he has already adopted in the
 “ accounting relative to the funds of the Scotch estate,
 “ that is, to allow Mr. Robarts a commission of
 “ two and a half per cent. on his recoveries, to charge
 “ interest at five per cent., balancing annually, under
 “ a deduction of the property tax while it existed, and
 “ to allow a commission of a half per cent. on th
 “ annual proceeds.”

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Agreeable to these principles the accountant reported a state of accounts.

Objections having been lodged by both parties to that report, and a record having been made up, the Lord Ordinary (Fullerton) pronounced, on 10th March 1832, this interlocutor:—" The Lord Ordinary having heard
" parties procurators on the objections to the account-
" tant's report by Abram Wildey Robarts, and having
" considered the closed record, Finds, That in the year
" 1796 the late Lewis Cuthbert, then resident in
" Jamaica, made over to the late Abram Robarts, his
" consignee and correspondent in England, the estate
" of Castlehill in the county of Inverness by a dis-
" position ex facie absolute: Finds, That this convey-
" ance was a conveyance to Mr. Robarts in trust, in
" order to secure him, first, in the payment of the
" debts then due, or which might become due to him
" by Mr. Cuthbert; and, secondly, against the conse-
" quences of the obligations contracted by Mr. Ro-
" barts as surety for Mr. Cuthbert in relation to the
" office of provost marshal of the island of Jamaica,
" held by Mr. Cuthbert on lease from the patentee
" Lord Braybrooke, current till the 24th December
" 1807, for the yearly payment of 2,000 guineas:
" Finds, That Mr. Cuthbert died in October 1802, at
" which time a large balance was due to Mr. Robarts
" in account with Mr. Cuthbert, and besides Mr. Ro-
" barts remained bound for the performance of the
" obligations of Mr. Cuthbert, as lessee of the provost
" marshal's office, until the expiry of the lease: Finds,
" That on the death of Mr. Cuthbert Mr. Robarts
" entered into possession of the estate of Castlehill,
" and in 1804 and 1805 sold certain parts of the

“ estate: Finds, That the further sales were inter-
 “ rupted by measures taken on the part of various
 “ creditors of Mr. Cuthbert in order to obtain pre-
 “ ferences: Finds, That on the 1st of August 1806 an
 “ arrangement was entered into between Mr. Robarts,
 “ the representatives of Mr. Cuthbert, and the cre-
 “ ditors, by which it was provided that Mr. Robarts
 “ should proceed to sell the remaining parts of the
 “ estate; and, after payment of his own preferable
 “ claims, should hold the balance as a fund of division
 “ among all parties concerned: Finds, That the minute
 “ of agreement contained inter alia the following
 “ article,—Fifth, That Mr. Robarts be requested to take
 “ the trouble of receiving the prices of the land sold
 “ and to be sold, and of paying the same, agreeable to
 “ the awards that may be given by the arbiter, not
 “ doubting that he will allow interest thereon after the
 “ rate of five per cent. per annum, so far as the said
 “ prices shall not be exhausted by payment of his own
 “ and the prior preferable debts: Finds, That in con-
 “ sequence of this arrangement the remaining parts of
 “ the estate were sold by Mr. Robarts in the years
 “ 1807 and 1808, and that the price received by him
 “ on the whole sales amounted to 52,321*l*.: Finds,
 “ That the arbitration contemplated by the parties
 “ having failed by the death of the arbiter, Mr. Ro-
 “ barts, in January 1808, raised a process of multiple-
 “ poinding, in which a remit was made to Mr. Charles
 “ Ferrier, accountant, to audit the accounts and claims
 “ of the raiser and the claimants, and that after various
 “ steps of procedure directions were given by inter-
 “ locutor of the 20th day of May 1809 to prepare an
 “ interim scheme of division to a certain extent on the

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“ amount of the debts: Finds, That a report was made
 “ by the accountant, suggesting a dividend of 10*s.* in
 “ the pound on the debts then claimed, with the pro-
 “ vision that payment of the dividend on certain of the
 “ debts to which objections had been started should be
 “ postponed till the objections were disposed of: Finds,
 “ That by interlocutor of 6th December 1809 the
 “ report was approved of, and the dividends, as well
 “ those immediately payable, as those of which pay-
 “ ment was suspended, were declared to bear interest at
 “ four per cent., without deduction of property tax:
 “ Finds, That before any further division took place,
 “ and while a great part of the suspended dividends
 “ remained in the hands of Mr. Robarts, he, by a
 “ minute in December 1811, intimated that claims to
 “ a very large amount had been made against him, as
 “ surety for the late Mr. Cuthbert, in relation to the
 “ office of provost marshal; that he was consequently
 “ entitled to retain the price of the lands of Castlehill
 “ in relief of those claims; and that in these cir-
 “ cumstances no farther division or payment of the
 “ fund in medio could take place: Finds, That
 “ Mr. Robarts’s claim of retention was disputed by
 “ Mr. Cruickshanks, one of the creditors holding
 “ right to one of the suspended dividends under the
 “ interlocutor 1809, but that the right of retention was
 “ finally sustained by an interlocutor of the court, of
 “ the 3d March 1815: Finds, That in consequence of
 “ this claim of retention all farther progress in the
 “ division of the fund in medio was suspended until
 “ February 1824, when a minute was given in by
 “ Mr. Abram Wildey Robarts, the representative of
 “ the original raiser, intimating that in consequence

“ of the arrangement effected by the patentee of the
 “ office of provost marshal with the consent of the
 “ creditors, his claim of retention was at an end:
 “ Finds, That the proceedings in the multiplepointing
 “ were then renewed, and that after a farther discussion
 “ consignment was made on the 8th of July 1828 of the
 “ balance of the price of Castlehill as admitted by the
 “ raiser, amounting to 28,117*l.* 15*s.* 5*d.*: Finds, That
 “ on the 24th of February 1829 there was a further
 “ consignment of the sum of 8,933*l.* 8*s.* 11*d.*, being
 “ money recovered in the years 1805, 1806, and 1807
 “ by the late Mr. Roberts from the sureties of a per-
 “ son of the name of Vaughan who had been indebted
 “ in the character of a deputy or sub-deputy to the
 “ estate of Lewis Cuthbert as holding the office of
 “ provost marshal, which sum had formed the subject
 “ of discussion in the Court of Chancery, and had been
 “ by the arrangement of the parties transferred to this
 “ multiplepointing: Finds, That the main question
 “ now remaining between the raiser and the common
 “ agent relates to the amount of the fund for which
 “ the raiser shall be held accountable, and that this
 “ question arises from the different views respectively
 “ maintained by them of the interest with which the
 “ raiser shall be charged, and the accumulations to
 “ which, according to the common agent, he should
 “ be subjected: Finds, first, That the interlocutor of
 “ 6th December 1809 is *res judicata* as to the amount
 “ of interest chargeable on the retained dividends, and
 “ that the said retained dividends having been ulti-
 “ mately paid to the creditors respectively, with interest
 “ at the rate of four per cent., agreeably to that inter-
 “ locutor, no claim for any higher interest on these

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“ sums during the time they were retained by the
 “ raiser is now competent to the common agent or
 “ the general body of the creditors: Finds, secondly,
 “ That according to a fair construction of the minute
 “ of 1806 the raiser is liable in interest at the rate of
 “ five per cent. on the sums in his hands, without accu-
 “ mulation, until the giving in of the minute of Decem-
 “ ber 1811, by which he, in virtue of his right of
 “ retention, suspended all measures which might have
 “ been otherwise taken for the consignment of the fund
 “ in medio, and its division among the parties con-
 “ cerned: Finds, thirdly, That from December 1811
 “ until the giving in of the minute in February 1824,
 “ during which his claim of retention was in force, he,
 “ agreeably to the principle adopted in the case of the
 “ executors of the Duke of Queensberry against Tait
 “ (23d May 1822), was not entitled to derive profit
 “ from that retention; and therefore, and in respect of
 “ the admission of the raiser upon oath in his answers
 “ in the Court of Chancery (No. 266 of process), that
 “ the whole funds in question were blended with the
 “ private funds of the raiser, and employed in trade or
 “ business, Finds, That during the period in question,
 “ while the claim of retention was enforced, the raiser
 “ is chargeable with interest on the sums accumulated
 “ as in December 1811, at the rate of five per cent.,
 “ with accumulations yearly, under deduction of the
 “ property tax, unless he can show that he did
 “ not derive profit to that extent from the funds so
 “ employed: Finds, That from February 1824, when
 “ the right of retention ceased, the raiser is liable in
 “ interest on the sums accumulated at February 1824
 “ at the rate of five per cent., without accumulation,

“ unless in so far as any part of the said sum has been
 “ consigned ; and therefore sustains the first objection
 “ for Mr. Robarts, in so far as it is consistent with
 “ the preceding findings ; quoad ultra, repels the said
 “ objection, and also repels the second objection, and
 “ remits to the accountant to amend the report on
 “ the principles above laid down : And, further, finds
 “ no expenses due.”

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On the same day his Lordship pronounced this other interlocutor : — “ The Lord Ordinary, having
 “ heard parties procurators on the objections of the
 “ common agent, bearing reference to Mr. Campbell Mackintosh, and Mr. Robarts, the raiser,
 “ Finds, That the business accounts of Mr. Mackintosh must be audited, if that be required by
 “ the objector ; to that extent sustains, and, quoad
 “ ultra, repels the objection in regard to Mr. Mackintosh ; also repels the objection of the common
 “ agent in regard to Mr. Robarts ; but remits to the
 “ accountant to consider whether and to what amount
 “ the gross sum of commission to Mr. Robarts is
 “ affected by the interlocutor on the objections of
 “ Mr. Robarts, disallowing, to a certain extent, the
 “ accumulations contemplated in the accountant’s former report ; quoad ultra, in regard to the three last
 “ general heads of the objections for the common agent,
 “ namely, Mr. Fraser’s accounts, the claim of the
 “ creditors for a higher rate of interest of the consigned sum, and the claim of the common agent for
 “ expenses, appoints the case to be enrolled, that the
 “ parties interested may be heard on these points
 “ which have not as yet been the subject of any
 “ argument.”

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Both parties presented reclaiming notes to the Inner House against these interlocutors, and on the 20th November 1832 their Lordships pronounced this interlocutor:—"The Lords, &c. adhere to the first
" and second findings of the interlocutor first com-
" plained of as to the rate of interest on the retained
" dividends, and also on the remaining fund in medio,
" prior to the month of December 1811: Find,
" that whatever rate of interest may be ultimately
" found due by the raiser (Robarts) on the said
" remaining fund since the said date of December
" 1811, he shall not be liable for accumulations;
" and in so far alter the interlocutors complained
" of; but as to the rate of interest during this period,
" appoint the case to stand over for further consider-
" ation, in respect that the Lords are equally divided
" in opinion upon that point."

Thereafter, on the 24th January 1833, their Lordships pronounced this interlocutor:—"The Lords, having re-
" sumed consideration of the process on the point reserved
" in their interlocutor of November 20, 1832, relative to
" the rate of interest chargeable against the raiser on the
" remaining fund since the month of December 1811,
" find interest due from that date till the dates of con-
" signation, at the rate of five per centum per annum,
" under the legal deduction of property tax; quoad
" ultra, remit to the Lord Ordinary to proceed as he
" shall see cause."¹

On the case returning to the Lord Ordinary he remitted it to the accountant to report a state of the

¹ 11 S., D., & B., p. 314.

fund in the hands of Mr. Roberts, prepared on the principle of giving effect to the interlocutors of the Court pronounced since his former report was lodged in process.

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He accordingly made a report, to which Mr. Roberts objected, 1st, that certain accumulations of interest had been stated against him, notwithstanding the interlocutors of the Court; 2d, that, on a particular sum, the accountant had stated interest upon interest; and, 3d, had disallowed commission. The Lord Ordinary on the 10th June 1834 pronounced the following interlocutor:—"The Lord Ordinary having
" resumed consideration of the debate, and advised the
" process, repels the first objection, in respect that, in
" bringing out the balance as at 31st December 1806,
" with which the additional report commences, there
" are annual accumulations of interest on both sides of
" the account, as stated by the accountant at page 30
" of the report; and as the balance was always in the
" objector's favour, he has no interest to state this
" objection: Repels the second objection, in respect
" that the sums consigned having been less than the
" sums now ascertained to have been due at the dates
" of consignment, the said sums so consigned are to be
" applied, in the first place, to extinguish the interest
" due, thus leaving the whole balance unpaid a principal sum upon which interest is due, so that interest
" upon interest is not charged: Repels also the third
" objection as to commission: Finds no commission
" due, in respect that being the friend and executor
" and disponee, with a power of sale, of the late
" Mr. Cuthbert, and much interested as a creditor in

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“ winding up his affairs, the late Mr. Robarts under-
 “ took the duty of trustee, without any stipulation for
 “ commission being made by him or on his behalf, at
 “ the meeting of 1st August 1806, when the Bishop of
 “ Rhodéz stated, that the object of the arrangement
 “ was with the view of yielding a reversion to the family
 “ of his brother, and that this be done at the least
 “ expense possible; and that the duty of managing the
 “ sales, and recovering the price was devolved on
 “ Mr. Campbell Mackintosh, the factor, who has
 “ charged and been allowed a commission for this
 “ trouble, the trouble of Mr. Robarts having been
 “ confined to receiving the proceeds in remittances
 “ from the factor, which to a large amount he was
 “ allowed to retain in his hands for unsettled claims,
 “ and for which he has been held bound to account
 “ only for simple interest: Therefore, on the whole,
 “ approves of the report; and having considered the
 “ claim of Mr. Robarts for expenses of process, which
 “ the Lord Ordinary holds to be open before him,
 “ finds no expenses due, and decerns.”

Mr. Robarts having presented a reclaiming note to the Inner House, their Lordships, on the 10th December 1834, pronounced this interlocutor:—“ The Lords, &c. adhere to the interlocutor complained of, and refuse the desire of the note; with this explanation, that as the accountant’s report contains alternative views of the state of the funds the interlocutors of Court are meant to apply to the first view of state, No. 6., bringing out a balance of 2,632*l.* 18*s.* 2*d.* due by Mr. Robarts as at 31st December 1833: Approve of said view; quoad ultra, remit to the Lord

“ Ordinary: Find the respondents entitled to expenses of process since the date of the said interlocutor,” &c.¹

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Both parties appealed against the above interlocutors, in so far as prejudicial to them.

Appellant (Roberts).—1. By the interlocutors complained of the appellant has been found liable in interest at the rate of 5*l.* per cent. per annum upon all the funds remaining in the hands of his father (with the exception of the dividends retained under the interim scheme of division) down to the dates of the consignment; and for interest at the rate of 5*l.* per cent. upon unascertained balances of interest which remained in his hands during the discussion; whereas he ought not to have been found liable for any higher rate of interest than simple interest at the rate of four per cent. upon any part of the principal sums in the hands of his father or of his executors after the 20th of December 1809, nor for interest at all upon the balances exhibited by the accountant's additional report as arising out of interest remaining unconsigned at the 18th of June 1828 and the 24th of February 1822, the dates of consignment. This he maintains, because neither he nor his father were guilty of any breach of trust, either express or implied, in respect to any of the funds which were retained by them; and the whole actings in relation to the estate were subject to judicial control after the action of multiplepoinding was raised, and the proceeds were placed at the disposal of the Court by the insti-

¹ 13 S. D. 173.

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tution of that action.¹ It was known to the creditors and representatives of Mr. Cuthbert that the appellant and his father retained the funds in the character of bankers. Such retention was not only sanctioned by the creditors and representatives, but also by the Court; and it was understood and agreed that his father should give the same rate of interest for the monies in his hands that could be obtained from a respectable banking house in Edinburgh. Besides, as bankers, he and his father were at all times liable to be called upon to produce the fund, and were ready to do so, and did, in fact, produce it when called upon. Indeed, the creditors and representatives well knew that the appellant and his father (being under an obligation to pay some interest) must be compelled to use the money in the manner which they thought best calculated to enable them to perform their obligation, precisely as any Scotch bank would have done if the money had been consigned in it. And it is a fact of public notoriety, that had the money been consigned in the Bank of Scotland, or any other Scotch bank, no higher rate of interest than simple interest at the rate of three and a half per cent. could have been obtained for the first six months after consignment; and although the Scotch banks would have allowed four per cent. for some time, they would have reduced that rate to three, two and a half, and two per cent., and only these reduced rates could have been obtained by the creditors and representatives. In regard to the minutes of the 1st of

¹ Newton v. Bennett, 1784, 1 Brown's Chancery Cases, 358; Perkins v. Baynton, 1784, 1 Brown's Chancery Cases, 375; Tebbs v. Carpenter, 1816, 1 Madd. 290.

August 1806, referred to by the Lord Ordinary in his interlocutor of the 10th March 1832, they ceased to have any effect, as respects the rate of interest, after the process of multiplepinding was raised, and the interlocutor of the 6th December 1809 pronounced, up to which time the appellant's father paid interest at the rate of five per cent. in conformity with the minutes, and thereafter at the rate of four per cent. in conformity with the terms of the interlocutor of the 6th December 1809. Further, it was in the power of the creditors to crave consignation of the funds in a bank in Scotland at any time,—the claim of retention having been stated in answer to an application not for consignation but for payment. In fact, no application was ever made for consignation which was not immediately complied with. But if any doubt existed as to the rate of interest to be paid, it was more reasonable for the appellant's father to conclude (after the interlocutor of the 6th December 1809, which fixed the rate of interest at four per cent.) that it would not be raised, than for the creditors and representatives to assume that, without any previous notice, he would pay five per cent., and which question it was competent for the creditors and representatives to have set at rest by application to the Court.

2. Commission ought to have been allowed to the appellant, because his father was entitled to a fair and equitable remuneration for the trouble he had in the business transacted by him for Mr. Cuthbert or his representatives, in receiving the rents of the Castlehill estate, in selling it, and receiving the proceeds thereof, and Vaughan's money. Indeed Mr. Cuthbert agreed with him that he should have commission allowed to

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him for his trouble in the business he should transact, and a commission had been charged by and been allowed to the appellant's father by Mr. Cuthbert for the business transacted during the life-time of Mr. Cuthbert.

Respondents.—1. In so far as Mr. Roberts received money belonging to Mr. Cuthbert's estates in Scotland, or elsewhere, beyond what was requisite for payment of the debts due to himself and to Mr. Tierney, he acted as trustee or executor, and accountable to others, and he was not entitled to make any profit for himself on the trust money; but as the money was kept by him and by his representatives, and used by them in trade, they are liable to make payment to Mr. Cuthbert's creditors and representatives of all the profits actually made by them. More particularly they are under such an obligation by the trust under which they acted in regard to Castlehill, as Mr. Roberts was expressly taken accountable to Mr. Cuthbert's executors for any residue of the price of that estate, and as by Mr. Cuthbert's will (of which Mr. Roberts was an executor) the executors were directed to invest all monies received from the heritable estate, or from other real or personal estates, in the public funds, or on other good security in Great Britain.¹

¹ Trevis v. Townsend, 1784, 1 Brown's Chancery Cases, 384; Littlehales v. Gascoygne, 1790, 3 Brown's Chancery Cases, 73; Franklin v. Frith, 1792, 3 Brown's Chancery Cases, 433; Forbes v. Ross, 1788, 2 Brown's Chancery Cases, 430; Sammes v. Rickman, 1792, 2 Vesey jun. 36; Massey v. Davis, 1794, 2 Vesey jun. 317; Piety v. Stace, 1799, 4 Vesey jun. 620; Roche v. Hart, 1805, 11 Vesey jun. 58; Raphael v. Boehm, 1805, 11 Vesey jun. 92; Ashburnham v. Thomson, 1807, 13 Vesey jun. 401.

If Mr. Robarts and his representatives have mixed the money with their own, so that the former cannot be distinguished from their own, and if the profits actually derived from the money cannot be ascertained, they are liable for interest at five per cent. with annual rests. In fact it appeared from a production made in the Court below, that Mr. Robarts had admitted upon oath, in certain answers for him in the Court of Chancery, that the funds in question were mixed with his private funds, and employed by him and by his representatives in trade or business, and profit made of them; and the appellants offered in the Court below to prove that the clear profits thence derived amounted to ten per cent. and upwards, that the profits derived in each successive year were in like manner mixed, and employed in each following year, and produced clear profits to a corresponding amount; and no answer was ever made to the calls made by the appellants in the Court below on Mr. Robarts to give specific statements of the actual employment of the money and of the profits thence derived, as appearing from the books and vouchers kept by Mr. Robarts, by his son, and by the houses of which they were partners.

Farther, as Mr. Robarts, in the contraction of the debts claimed by himself against Mr. Cuthbert, charged and received interest at five per cent., with annual rests, while the balance was in his favour, and a course of dealing has been thus established, he was not entitled to alter that course of dealing to the prejudice of Mr. Cuthbert's estate when the balance turned against him.

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It is at all events clear that as to the period from December 1811 (when Mr. Robarts gave in a minute, by which he, in virtue of his right of retention afterwards sustained, suspended all measures which might have been otherwise taken for the consignment of the fund in medio, and its division among the parties concerned,) till February 1824, he was not entitled to derive profit from that retention, which, however, he will derive to an immense amount under the interlocutors appealed against.¹

2. As Mr. Robarts acted as a trustee and executor without having made any stipulation for remuneration for his own trouble, he is not entitled to demand any²; indeed the circumstances in which Mr. Robarts accepted the trust show that no charge for his own trouble was contemplated; and, besides, a commission has already been allowed to Mr. Mackintosh his factor, who had the trouble of superintending the sales and recovering the prices, while Mr. Robarts, himself a banker, had no trouble as to these matters beyond receiving bank drafts from Mr. Mackintosh.

LORD BROUGHAM.—The appellant by the conveyance and the bank letter obtained a right over Castlehill in security,—a security, that is, for debts due to him and engagements undertaken by him, with a power of sale, on the condition, however, of accounting to Cuthbert's executors for the balance of the price after satisfying

¹ Duke of Queensberry's Executors against Tait, 23d May 1822.

² Erskine, b. iii. tit. 3. sect. 32., and b. iii. tit. 9. sect. 26; Montgomery against Wauchope, 1816, 4 Dow, p. 109; Brocksopp against Barnes, 3d July 1820; 5 Maddocks, p. 90.

those debts and liabilities in the event of his executing the power by selling the estate. There seems no accuracy in the view of the case which considers him as thus becoming a trustee for creditors,—the contention of the respondents on which mainly the claim is grounded to carry back the accounting. He was rather a debtor to the estate of Cuthbert and to those who were interested in it. He became such debtor by having availed himself of the right he had to sell, and he thus received money, the balance of which he was bound to account for and to pay over whensoever the parties entitled should appear,—those parties who could give him a valid discharge. Upon becoming executor he had a double character;—as representing the estate,—against himself as holding the balance of the price. But even now the portion of the estate was not such as enabled him to settle all claims at once and pay over the balance; nor, indeed, could he be discharged from his own engagements for which he had taken the security,—a large debt, originally stated at 20,000*l.*, hanging over him. He might indeed have consigned the money; but if he did not insist on doing this, it was the business of the creditors and others interested to make him do so; and no doubt at all is made of their title to require the consignment. Now, observe what they did in these circumstances. Instead of requiring consignment they resolved by the minute of 1806, regularly intimated to Mr. Robarts, that the money should remain with him, stipulating for interest at five per cent., without one word being said, or any understanding come to, respecting accumulation.

In fact there can be no doubt that the security of the great house of Robarts and Co. was deemed equi-

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valent to consignment by a formal deposit in any other bank; and it is also to be observed that this leaving the money with Robarts and Co. secured them five per cent., whereas had the money been consigned formally, and lodged under the orders of Court in any other bank, certainly not more than four per cent. would have been obtained, perhaps not so much, besides the payment of the dues of the consignment. The correspondence, independent of Robarts's judicial statements in 1829, shows that he distinctly refused to hold the money for the suspended dividends at more than four per cent. Unquestionably down to 1811 at least, the general fund left in his hands in 1809, not by his own act, but by the act of all who stipulated for the five per cent. interests in 1806, was so left by them on no other undertaking than his allowing that rate of interest to be charged against him.

It therefore appears that the Court below were warranted in holding that agreement binding as long at least as the money was retained through no difficulty or objection proceeding from Mr. Robarts himself.

Next, as to the suspended dividends. The interlocutor of Lord Cringletie in 1809 fixed the interest on sums retained for those suspended dividends at four per cent., and this appears plainly to be *res judicata*. The minute of that year, in which Mr. Robarts makes the statement whereupon the interlocutor was given, expressly raises the question for the Lord Ordinary's decision, by stating most distinctly that he, Mr. Robarts, must not be expected to hold the money waiting for the result of the multiplepounding at any higher rate than four per cent., and assigns the reason for this

refusal with a statement that four per cent. was one quarter or one half more than could for six months at least be obtained elsewhere should the money be consigned. In this interlocutor the parties acquiesced; and if it proceeded on the point,—that is, if the question now raised was then raised, as the minute shows it to have been,—it is clearly *res judicata*, and excludes the contention now.

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But the principal question remains, over which it is impossible to deny that considerable difficulty and some doubt hangs; nevertheless, upon the whole, I am not prepared to say that the Court below has miscarried, although it is impossible to feel the same confidence in the decision which I have not any hesitation in expressing upon the other parts of the case.

In 1811, when affairs were, as it were, ripe for a distribution of the fund, a heavy debt, the amount of which could not be ascertained, was due on the provost marshal's bond. The estate, and the creditors as interested in it, were liable to relieve Mr. Robarts of this obligation; and thus the difficulty of ascertaining the amount rested primarily upon them, and their business it was to remove that difficulty. His right to retain the price of the Castlehill estate, in security or indemnity, was at least clear, and was not contingent upon his stating the amount, and claiming the security of the retention; it was a right of indemnity absolutely, to whatever extent his liability might expose him eventually, to a loss. He did not propose to consign for the contingent balance, and no demand of consignment was made by them. The Court have apparently thought that in these circumstances the original arrangement of

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1806 must be, as it were, considered to continue; at any rate, they have taken the terms of that arrangement as their guide or canon, and regarded five per cent., without rests, as alone due; while Lord Fullerton, having regard to Mr. Robarts's admission in the chancery suit that the funds had been mixed with his own as a banker, gave annual rests against him.

It must however be remarked, that when the fund is said to have been mixed with Mr. Robarts's funds in his bank, the meaning is this,—as a banker he uses all the monies deposited with him by his customers, but he is liable at a moment's notice to repay every shilling so deposited by each customer. If any customer dies he (the banker) is liable to repay to the executor or other personal representative,—to whoever can show a title,—that is, to whoever can give a valid discharge. In no other position did Mr. Robarts here stand in relation to the estate of Cuthbert. He was liable to pay to the persons representing that estate the instant that they appeared, and appeared in such a shape and position as enabled them to give a valid discharge. They might have obtained an order of Court for consignation if they could not clear up the difficulties which prevented them from demanding to have the balance paid over to them by disabling them from giving an effectual acquittance. In these circumstances, as they did not take such steps the Court below appear to have acted rightly in not allowing them to share in the profits of Mr. Robarts as a banker. He did not, however, make any protest, as in the case of the suspended dividends, to protect him against five per cent., and limit the charge to four.

There is a mistake in the appellant's statement regarding consignment.

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He speaks of the rate of interest allowed merely. But when the fund is long in the Court's hands the practice always is to take it up, and re-deposit with the accumulations of interest, by the authority of the Court, once in a year at least, sometimes half-yearly. Now, the bank interest being four per cent., this would be the rate upon the funds consigned, and therefore, nothing could be more evident, than the fitness of charging Mr. Robarts with this interest, and yearly rests at the same rate. But then it is equally clear that the fund and the creditors would by this proceeding gain less than if five per cent. interest were allowed without rests, at least during the term of the actual debt and interest, in this case, and a great deal longer. Even if half-yearly rests were allowed it would not exceed five per cent. without accumulation; and it is evident that the possibility of the Court ordering half-yearly upliftings, and re-deposits in the event of consignment, would not authorize half-yearly rests in a case like the present.

The appellant grounds upon the refusal to pay more than four per cent. on the suspended dividends, and upon the interlocutor of 1809, pronounced on the question then raised by his refusal, and now taken as *res judicata*,—an argument that he should only have been held liable for simple interest at the rate of four per cent. on account of the respondents never having required consignment. This circumstance of no demand having been made may be sufficient to exclude rests in case five per cent. is allowed; but the appellant might himself have consigned, and he was retaining, on an objec-

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tion taken by himself, a fund which, whatever uncertainty might hang over the amount at first, proved eventually much beyond the liability to cover which it was retained. It seems therefore quite right that he should be held liable for as much as the estate would have got, had the consignation taken place; which consignation he might have made (observe) without any detriment to his security. Had that step been taken the fund would, on the one hand, have been forthcoming to answer his demand of indemnity, whensoever the extent of his liability should be ascertained, so as to liquidate his claim on the fund; and it would have been lying, on the other hand, for the benefit of the estate, at four per cent. interest, with upliftings and re-deposits under the Court's authority,—that is, with the benefit of yearly rests at least,—all the while that the extent of his liability remained unascertained.

Nothing can be more equitable, therefore, than that he in whose hands it was held unnecessarily for the security of himself, who, though he could not pay to the estate, could at all events have consigned so as to benefit that estate, without injuring his own security, should repay to the estate what it had thus cost,—that is, four per cent. with yearly rests. So far, then, full justice appears to be done to the appellant, and a fair measure meted also to the respondents. But it must be added that even if the respondents are right in their claim of five per cent. with rests, and the judgment now under review is erroneous, the claim is wholly untenable beyond the month of March 1826, when Mr. Roberts gave in a minute to the Court, stating his desire to get rid of the fund by consigning it to a bank in London,

so he was released from the Chancery proceedings. Now, though this condition annexed to his tender is such as would prevent a plea of tender of payment from being supported by the strictness and the nicety of our common law pleadings and practice, probably also by that of Scotland, yet still it must materially affect the discretionary question of rests, which always depends upon the whole circumstances of the case, and the whole conduct of parties, where the question arises upon the difference between retaining the fund and consigning it, as it is here alleged he should have done. Let us see, then, what reception an offer so fair in itself met with from the respondents. They resisted the reasonable proposition formally and judicially made, and they craved consignment of the whole fund in medio, without any regard to the Chancery suit.

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The Lord Ordinary's opinion of this proceeding, in which I incline to concur, is shown by his interlocutor upon the minute, and the discussion arising out of it. He ordained the respondents to produce evidence of the Chancery suit being finally settled or ended, and only authorized consignment by the appellant after such evidence should be produced. It was not for two years and more that the respondents produced such evidence, and yet they seek to charge Mr. Robarts during that time also with interest at five per cent., and accumulations. Even upon this extreme view of the respondents right to rests at five per cent., there might be ground for restricting the claim to the period which elapsed before February 1824, the date of the appellant's minute, stating his readiness to pay the retained dividends; but in no view whatever can the accumulations be

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claimed at five per cent. after March 1826. Therefore, even if your Lordships should have differed with the Court below as to the principle on which the rests and rate of interest should be awarded, the application of that principle would be very far from carrying the respondents the whole length of their contention; but I have already said that I am not prepared to advise your Lordships to differ with the Court below upon the principle adopted, for the reasons which I have assigned.

There remains to be disposed of the question of commission, forming mainly the subject matter of the cross appeal.

The accountant's reason for refusing commission is manifestly untenable. The Court differing with him upon the principle which ought to govern the allowance of interest is not a ground of refusing commission, if on other grounds commission was due. But I do not consider it to be due upon any good grounds. In no capacity in which Mr. Robarts, and those he represents, stood, can it be due by law without express stipulation,—and stipulation there was none in this case. As executor he plainly can have no such right. The old act 1617, c. 24. has not been relied on; and if it were, would most likely not avail him. As factor he has no locus standi in the question at all. Then has he any such claim as holder of an heritable security with a power of sale, and as a party executing that power by bringing the estate to a sale, and retaining the price for his indemnity, subject to account for the balance whensoever this should be ascertained by his liabilities being at an end? I think most clearly not. He was holder for his own

security in respect of actual advances, and for his own indemnity in respect of future liabilities; he was donee of the power in the same capacity of creditor and part liable; he was vendor in the same capacity; in the same capacity he was receiver of the purchase money; and in the same capacity he retained that price until his liabilities being at an end, their extent, and the equal extent of his claim on the fund for indemnity, could be ascertained. In all this acting, and in this capacity, he was merely acting for his own security, that is for his own benefit. Foreseeing trouble and even expense, he might have bargained for commission in consideration thereof; but he made no such stipulation, and he can have no such claim. In truth he sells for his own behoof, to advance his security, probably by preventing any injurious fall in the price of the estate. The allowance, apparently ample, of about 1,000*l.* to Mr. Mackintosh, Mr. Robarts's factor, who sold the estate and received the price, appears sufficient, and perhaps more than sufficient, to cover any possible demand of Mr. Robarts's on account of that transaction.

He manifestly then can have no claim for commission as vendor and receiver of the purchase money. In all the rest of his proceedings he is an accounting party merely,—that is, a debtor either actually or contingently to the estate; and surely in that quality he can claim no commission, although in that quality a question has arisen how far he is liable to the estate for his retention of the price and the profits, which question has been finally disposed of in deciding upon the original appeal.

The question of costs below, which is made one

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ground of the cross appeal, is virtually decided by affirming the interlocutors appealed from.

In consideration of the doubts which I entertained, as I have already stated, upon the principal question in the original appeal, I conceive that how laborious soever for the House the cause has proved, and how burthensome soever for the parties, it was a fit subject of appeal.

In affirming the judgment below, I therefore am clearly of opinion that no costs of that original appeal should be allowed; nor must it be forgotten, that though a party by styling himself trustee repeatedly may not make him one, yet it leads his adversary naturally to treat him as such.

But I do not at all view the cross appeal, and the question of commission raised by it, in the same light. And I have but one doubt as to giving the costs of that cross appeal; namely, that but for the original appeal we might possibly never have had the refusal of commission disputed here. It would, however, be a dangerous principle to hold, that a groundless if not a frivolous cross appeal might always be safely presented against one part of a judgment merely because the residue of the judgment had not been acquiesced in by the party against whom it was given; and I therefore, having no doubt at all upon the merits of the cross appeal, recommend your Lordships, in affirming the judgment, to give the costs of that cross appeal.

The House of Lords ordered and adjudged, That the said original and cross appeals be and are hereby dismissed this House, and that the interlocutors, so far as therein

respectively complained of, be and the same are hereby affirmed: And it is further ordered, That the appellant in the said cross appeal do pay or cause to be paid to the said respondent John Court and others the costs incurred in respect of the said cross appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered and directed, That the costs incurred by the respondents in the said cross appeal in the proceedings in the Court below, occasioned by the said Abraham Wildey Robarts disputing his liability to pay five pounds per centum per annum without annual rests, and by his claim of commission, or in relation thereto respectively, shall be paid by the said Abraham Wildey Robarts, the appellant in the said cross appeal, if any such costs remain unpaid: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, with this direction, to do therein as shall be just and consistent with this judgment and direction.

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and others.

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BAXENDALE, TATHAM, UPTON, and JOHNSON—DAY and
HUGHES, Solicitors.

[30th July 1838.]

JAMES HAMILTON Esq. and ARCHIBALD ARTHUR,
Appellants.—*Dr. Lushington—Austin.*

WILLIAM DUNN Esquire, Respondent. — *Attorney
General (Campbell)—Sir Wm. Follett.*

Landlord and Tenant.—Nuisance.—A landlord let premises to a tenant for nineteen years, “to be used for the purpose of bleaching, dyeing, or printing, and any other operations connected with bleaching, dyeing, or printing, or for agriculture,” and the tenant subset the premises. In an action against the landlord, the tenant, and the sub-tenants, for interdict, on the ground that the operations of the sub-tenants amounted to nuisance, two issues were sent to trial, one as to the fact of nuisance created by the sub-tenants, and another “whether the landlord or tenant, by themselves or another or others authorized by them, did wrongfully pollute and spoil the water, &c.” At the trial the Judge directed the jury on the first issue in terms as to the law which were afterwards held to be erroneous, and on the second issue that even if nuisance was proved against the sub-tenants, still as there was nothing but the lease to connect the landlord and the tenant therewith, there was no ground in law for holding that they or either of them had authorized or were answerable for that nuisance; and a verdict, which was found for all the defenders, was set aside, and a new trial allowed on both issues; and this was acquiesced in as to the first issue:—Held (affirming the judgment of the Court of Session) that as the charge given under the first issue was erroneous, a new trial should be allowed of the second issue.

THE respondent is proprietor of the lands of Faifley and Duntocher, in the parish of Kilpatrick and county of Dumbarton, on which he has erected several extensive cotton mills. Through these lands there flows a stream named the Cochno or Duntocher Burn, which, for a period beyond the memory of man, has been employed for manufacturing purposes, and on which there have existed dye-works for more than a century. Immediately on its entrance into the respondent's property, it passes into a dam or reservoir, and during its whole course through the lands of Faifley and Duntocher, it passes from one reservoir to another, being constantly either in them, or in the connecting leads, or conducting channels, and turning the wheels of the several works situated on its banks. Before reaching the respondent's lands this stream passes through the property of the appellant, Mr. Hamilton, and about a mile above the boundary of the respondent's property there are certain premises now occupied as a Turkey-red dye-work situated on its banks on the lands of the appellant Mr. Hamilton. These premises had been let about fifty years ago to one M'Nicoll as a printfield, and had been used as such by him, and they were afterwards occupied by one Colquhoun as a bleachfield, and on his leaving them in 1822 they were let by the late Mr. Hamilton, father of the appellant, to the appellant Arthur, at a rent of 60*l.*, for a period of nineteen years, by a lease in the following terms:—

“ All and whole that bleachfield, with the buildings
 “ thereon, lying on the south side of the road leading
 “ from Edinbarnet lint-mill to Faifley, and as presently
 “ possessed by Alexander Colquhoun, bleacher there,

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“ lying within the parish of Wester Kilpatrick and
“ shire of Dumbarton, and that for and during the
“ complete term and space of nineteen years from and
“ after the term of Whitsunday 1823, which is hereby
“ declared to be the term of the said Archibald
“ Arthur’s entry thereto; declaring always that the said
“ subjects hereby set are to be used for the purpose
“ of bleaching, dyeing, or printing, and any other
“ operations connected with bleaching, dyeing, or
“ printing, or for agriculture.” It also contained a clause
of absolute warrandice, and Arthur bound himself
that he should keep the buildings and fences in good
condition, crop the land contained in the lease as
there prescribed, and “ leave the lands at the expira-
“ tion of the lease fitted in all respects for the
“ purposes foresaid, and shall make and use them
“ in no other way than is before specified, without the
“ consent in writing of the said James Hamilton or his
“ foresaids.”

Arthur entered into possession of the premises thus
let, and occupied them as a bleachfield till 1826,
when he subset them at an increased rent to certain
parties, who are thus described in the sublease:—
“ James M’Donald, printer at Dalmarnock, and
“ James Young and Angus Fletcher, merchants in
“ Glasgow, intending to carry on business as printers
“ at Cochney, under the name and firm of M’Donald,
“ Young, and Company,” and to their heirs and
“ assignees.

This sublease, which was granted expressly “ under
“ the several conditions particularly specified and con-
“ tained ” in the principal lease, came ultimately to be

vested in James M'Donald and Hugh M'Kay, and under it the premises were, from the commencement of the sublease in 1826, used for the purposes of Turkey-red dyeing, which is a process of a peculiar nature, and of comparatively recent introduction.

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The work, which was let to M'Donald and M'Kay, was situated on the Cochno or Cochney Burn, which, after flowing through Mr. Hamilton's estate, is joined within the lands of the respondent by another burn, called the West Burn, and the united stream flowed down through the lands of the respondent, who had erected extensive spinning-mills and manufactories on his property along the stream. There were also villages on its banks, within his property, containing a population of 3,000 persons and upwards.

In 1834 the respondent raised an action before the Court of Session against the appellant Mr. Hamilton, and against Arthur the principal tenant, and M'Donald and M'Kay the sub-tenants, setting forth, that on part of the property of Mr. Hamilton there was a work occupied by M'Donald and M'Kay, on the side of the Cochno Burn; that within these few years it had been changed from a bleachfield to a Turkey-red dye-work; "that from the said work the defenders, or one or other of them, have taken upon them to discharge into the said burn great quantities of the most impure, noxious, and deleterious substances, consisting of madder roots or other substances of that description," whereby the stream was rendered totally unfit for the use of man or beast, the fish in it were killed, its colour turned to blood, and its smell rendered most offensive. The

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conclusions of the action were, that “ the said James
“ Hamilton and Archibald Arthur, and M'Donald
“ and M'Kay, (as individuals and partners,) should
“ be interdicted from discharging any madder-roots,
“ or water impregnated with the same, or other
“ dye stuff or deleterious or noxious or impure
“ stuff of any kind, into the said burn, whereby the
“ said burn, in its progress through the pursuer's
“ property, may be polluted or rendered unfit for
“ domestic use or manufacturing purposes, or its
“ amenity diminished, or the property of the pur-
“ suer in any way injured,” reserving all claim for
“ damages.

In defence against this action Mr. Hamilton
stated, that the premises had “ been used as a dye-
“ work and bleachfield for a period beyond the years
“ of prescription, with a certain interval as to the
“ dyeing operation; that the present lease was granted
“ in 1822, the purposes for which the premises were
“ to be used being specified to be for bleaching,
“ dyeing, or printing, and other operations connected
“ therewith; that all these operations were carried
“ on, and considerable expense laid out on the
“ work, in the knowledge of the pursuer, without
“ a whisper of complaint from him, till immediately
“ before intenting this action; that the water dis-
“ charged from the dye-work passes through a filter
“ before entering the stream; that from the moment
“ it passes the dye-work it is drunk by the cattle of
“ the defender's tenants, and those on an intervening
“ property, without the slightest injury; that the
“ pursuer has himself a dye-work and a gas-work

“ on the stream, a little below the point where it
 “ enters his property, the discharges from which are
 “ much more noxious and injurious than those com-
 “ plained of; and that, in point of fact, no injury is
 “ done to the water by the operations carried on in
 “ the dye-work occupied by the defender’s tenants.
 “ At all events, if any injury occasionally happens, it
 “ must be owing to the negligence or misconduct of
 “ the tenants themselves, in exercising their powers
 “ under the lease, which are in no degree necessarily
 “ productive of injury to the water, and for this they
 “ alone are responsible. At the same time, the de-
 “ fender is perfectly willing to concur in any measures
 “ which may be recommended by men of skill as ne-
 “ cessary to secure against such occasional injury, if it
 “ do occur, which the defender does not admit to be
 “ the case.”

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In his defence, Arthur stated, that his actual possession of the premises had only been from 1823 to 1826; that he had used them as a bleach-field during that period, and had not in the least injured the water in the burn; and that he had not granted, under the sub-tack, any broader right than he himself held under the principal tack from Mr. Hamilton.

On the part of M'Donald and M'Kay it was stated, that though the refuse from their works was necessarily, to a certain extent, discharged into the burn, they had adopted unusual, and even unnecessary, precautions to limit it as much as possible; and that though the water was occasionally tinged by such discharge, it was not rendered noxious, unwholesome, or unfit for other pur-

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poses; and they denied the respondent's allegations on that subject. They alleged that their works were not more injurious to the water than a bleachfield would be; and that they had been used as a bleachfield and dye-work beyond the long prescription. They also alleged that the respondent had acquiesced for eight years in their use of the works, during which period they had made expensive erections for carrying them on.

The two following issues were sent to trial.

" It being admitted that the pursuer is proprietor
" of the lands of Duntocher and Faifley, situated on
" the side of the Cochney, Duntocher, or Dalmuir
" Burn, and that one of the streams which unite to
" form the said burn passes through the property of
" the defender Hamilton; it being also admitted, that
" on the said property of the defender Hamilton there
" are certain premises and buildings erected, of which
" the defender Arthur is or was tenant, and the
" defenders M'Donald and M'Kay are sub-tenants;
" Whether, during the year 1826 and subsequently, or
" during any part of the said period, the defenders
" M'Donald and M'Kay did, by certain operations
" carried on in the said premises and buildings, wrong-
" fully pollute and spoil the water of the said burn, so
" as to injure the quality of the water of the same, to
" the nuisance of the pursuer as proprietor of the
" lands aforesaid? Whether during the said period
" the defender Hamilton or his predecessors, or the
" defender Arthur, by themselves, or another or
" others authorized by them, did wrongfully pollute
" and spoil the water of the said burn, so as to

“ injure the quality of the water of the same, to
 “ the nuisance of the pursuer as proprietor of the said
 “ lands?”

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The trial came on at Glasgow in September 1836 before Lord Jeffrey and a special jury.

The respondent adduced evidence to prove his allegations of nuisance arising from the operations as carried on by the occupying tenants; but his case, in so far as regarded the present appellants, the landlord and principal tenant, was limited to the original lease by the former, and the sublease to the occupying tenants by the latter.

The appellants led no proof, and on this state of the evidence Lord Jeffrey directed the jury, with reference to the second issue, as follows:—“ And the said Lord Jeffrey did further direct the jury, in point of law, “ that with respect to the liability of the landlord and “ principal tenant, under the second issue,—assuming “ that there had been actual nuisance proved,—as “ there was nothing to connect these defenders with “ the supposed nuisance but the lease and sublease “ granted by them respectively, there was no ground “ in law for holding that they or either of them had “ authorized or were answerable for that nuisance: “ That the other defenders, the persons in occupation, “ did not stand in the relation of agents or servants of “ the landlord or principal tenant, and that although “ they might have misused the manufactory, the landlord was not liable for a nuisance by the tenant in “ occupation, unless that nuisance had been sanctioned “ by him: That as the lease in this case said nothing “ as to Turkey-red dyeing, but simply related to

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“ dyeing, which did not mean the establishment of any
 “ dye-work poisonous to the water, this did not imply
 “ a licence to carry on the dye-work in such a way
 “ as to be a nuisance: That the question then was,
 “ whether it was possible to carry on a dye-work on
 “ this stream, at an ordinary profit, without committing
 “ a nuisance? That the pursuer having led no evi-
 “ dence that this could not be done, the defenders in
 “ this second issue were entitled to a presumption in
 “ their favour; and that if the jury were satisfied, in
 “ point of fact, that a dye-work might be carried on
 “ in these premises without a nuisance, or that injury
 “ might be prevented without much expense, then the
 “ landlord was not liable for any negligence in the
 “ carrying on of the work; and as there was no proof
 “ to connect him or the principal tenant with the
 “ existing dye-work, except the lease, they were not
 “ responsible in law for the carrying on of that work,
 “ or for any nuisance thereby occasioned.” The jury
 returned a verdict for all the defenders, and on both
 issues.

To the above direction an exception was taken
 by the respondent, who also took other exceptions,
 five in number¹, to the previous part of his Lord-
 ship's charge in reference to the first issue, which
 regarded the occupying tenants only. The bill of
 exceptions, embracing all these exceptions, among which
 that now in question was numbered the “ sixth,”
 having been argued before the First Division of the

¹ See 15 D., B., & M., 853, where the bill of exceptions and the
 opinions of the Court will be found.

Court, their Lordships, on the 11th March 1837, pronounced the following interlocutor:—"Sustain the bill of exceptions as to all the exceptions, excepting the fifth exception, which is disallowed; set aside the verdict in this case, and grant a new trial of both issues, but find no expenses due."

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Mr. Hamilton and Mr. Arthur appealed against this interlocutor, in so far as it allowed the exception to the direction above recited, and in so far as it set aside the verdict, and granted a new trial on the second issue.

Appellants.—The respondent was undoubtedly entitled to an interdict against the party actually doing the wrong, if he succeeded in proving the nuisance alleged. To entitle any one, however, to an interdict against another, it is not enough that the act sought to be interdicted is one which the latter has no right to do, and which will injure the party complaining; it is necessary that the party sought to be interdicted shall have previously committed a wrongful act by himself, or others authorized by him to commit it, or given just ground for apprehending that he was about to commit it. This has been long settled in the law of Scotland, and indeed it was conceded by those Judges who concurred in the interlocutor of the Court below. If, therefore, the respondent had, in his summons, merely alleged that the discharge complained of was the act of the occupying tenants alone, he could have sought no interdict against the principal tenant or the landlord. He would have had his remedy by interdict against the occupying tenants who had com-

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mitted the wrong; but he could not have sought any interdict against the landlord and principal tenant, who were not alleged to have done or authorized the wrong.

Accordingly, recognising this principle, and the necessity of alleging the nuisance complained of to have been the act of these parties as well as of the the occupying tenants, in order to raise any case as against them, the respondent in his summons and on the record expressly alleged the nuisance complained of to be the act of all the defenders equally.

The respondent at the trial abandoned all attempt to establish that the appellants had polluted the water by themselves, so that the only question came to be, whether they had done so "by another or others "authorized by them;" and no evidence having been led to show that they had done so in fact, the point resolved into a question of law, whether a general authority by a landlord in a lease to use the premises let for the purpose of "dyeing," or "operations "connected with dyeing," imported an authority to establish a dye-work which should prove a nuisance, or to conduct it so as to create a nuisance.

There is not between a landlord and tenant any such personal relation as subsists between a master and servant, and renders the master responsible for the wrongful deeds or negligence of his servant acting in his service, so as to cause such acts to be considered as the acts of the master who employs him. The matter depends on the construction of the lease, whether it can be held to import an authority to use the premises unlaw-

fully, and to the injury of a neighbour. Now, it is clear that without any express stipulation to that effect there is an implied condition in a lease with general powers, that these are to be exercised according to law, and in consistency with the rights of others.

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This rule is founded on general principles of law, and it has been given effect to in the Courts of Scotland, as was established in the case of Henderson and Thomson v. Sir Michael Shaw Stewart, decided by the First Division of the Court on the 23d June 1818.¹

¹ This case is not reported, but the following statement of it was given by the appellants, taken from the Session papers :—

By lease entered into in 1796 between John Shaw Stewart, Esq., of Greenock, on the one part, and Michael Bogle and others, their heirs and assignees, Mr. Shaw Stewart let to these parties a mill called the Easter Mill of Greenock, with a special power of erecting dams for the collection of water for the use of the mill, thus expressed, "with liberty also to the said tacksmen and their foresaids to erect dams for collecting the water in the burn of Crawford's Burn, or in the muirs of Greenock, they always paying the damages to the tenants and possessors of the adjacent lands occasioned thereby." This lease Mr. Shaw Stewart bound himself and his heirs "to warrant at all hands and against all deadly, as law will." It appears to have contained no stipulations as to keeping in sufficient repair and security the dams which might be erected.

In virtue of the powers conferred by the lease, the lessees formed a reservoir in the muir of Greenock, belonging to Mr. Shaw Stewart, by the erection of an embankment or bulwark. The reservoir was about twenty feet deep in the centre, with a general average depth of from six to eight feet, and it covered three Scotch acres, so that it contained when full a very considerable mass of water. It was alleged that the embankment had been insufficient when first erected, that it had not been kept in proper repair, and that the landlord had never taken any steps to correct the negligence of the lessees. In the year 1806 the embankment burst, and the water in the reservoir, pouring down in a torrent, swept away several houses, and damaged many others. Certain parties, named Henderson and Thomson, proprietors of houses which had been thus

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The same principles have been given effect to in the English Courts; and in the recent case of *Rex v. Pedley*¹ the Court held the rule of the case of *Prior v. Rosewell* to apply, and Littledale, J., observed, "I see no difficulty
" in this case. If a nuisance be erected, and a man pur-
" chase the premises with the nuisance upon them,
" though there be a demise for a term at the time of the
" purchase, so that the purchaser has no opportunity of
" removing the nuisance, yet by purchasing the reversion
" he makes himself liable for the nuisance; but if after
" the reversion is purchased the nuisance be erected
" by the occupier, the reversioner incurs no liability.
" Yet in such a case if there were only a tenancy from

damaged, brought an action of damages for the loss sustained against the lessees, and also against the landlord, Sir Michael Shaw Stewart, who had now succeeded to the estate of Greenock.

In defence against this action Sir Michael pleaded, that "it was implied in any permission that his predecessors granted, that the dam should be sufficient, and kept in proper repair; and if it was not, the reservoir was just as unauthorised by the defender as any act from which injury or violence could result to the pursuers or the public."

The cause having come before Lord Gillies, his Lordship appointed parties "to debate as to the liability of Sir Michael Shaw Stewart." He afterwards ordered written pleadings, and ultimately his Lordship pronounced the following interlocutor:—"The Lord Ordinary having considered the memorial for the pursuers, with the memorial for Sir Michael Shaw Stewart, baronet, defender, sustains the defences pleaded for the said Sir Michael Shaw Stewart; assoilzies him from the hail conclusions of the libel, and decerns."

This judgment was submitted to the reconsideration of Lord Gillies by a full representation for the pursuers, followed by answers for Sir Michael Stewart, but was adhered to by his Lordship.

The question was then carried by reclaiming petition to the Inner House, by whom the following interlocutor was pronounced:—"Edinburgh, 23d June 1818.—The Lords having heard this petition, they refuse the prayer thereof, and adhere to the interlocutor of the Lord Ordinary reclaimed against."

¹ Adolphus and Ellis's Reports, 822. See *Cheetham v. Hampson*, 4 Term Reports, 318, and the Cases there referred to.

“ year to year, or any short period, and the landlord
 “ chose to renew the tenancy after the tenant had
 “ erected the nuisance, that would make the landlord
 “ liable: he is not to let the land with the nuisance
 “ upon it. Here the periods are short, so that there
 “ has been a reletting, and that has taken place after
 “ the user of the buildings had created the nuisance.
 “ This is, therefore, a case in which the reversioner
 “ is liable.” The other Judges delivered concurring
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Under the principle recognised in all these decisions, it seems clear that in relation to the present case Lord Jeffrey laid down the law correctly to the jury. The appellants had not themselves created the nuisance; they had not let the premises with a nuisance, or the manufactory which is said to have created it. It was not even alleged that the landlord had received a higher rent than he had drawn under the former lease while they were held merely as a bleachfield; and although the principal tenant had obtained a surplus rent, the sublease itself proved that he only contemplated the premises being used for the purpose of a print work. The pursuer made no attempt to show that a dye-work might not have been profitably carried on in the premises in question without a nuisance, and Lord Jeffrey accordingly states, that “the defenders
 “ were entitled to a presumption in their favour” on this point.

The respondent can have no legitimate interest in seeking for a verdict against the present appellants. He has no conclusion that the landlord shall be interdicted from granting a lease of the premises in future

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with a power to use them for the purpose of dyeing. He does not even conclude to have him prohibited from letting them as a Turkey-red dye-work in time to come. Nay, he does not conclude to have the works stopped, but simply for an interdict against "discharging" into the stream madder-roots, &c. "whereby" it "may be polluted or rendered unfit for "domestic use or manufacturing purposes." He seeks no remedy, therefore, which he would not equally gain by a verdict against the occupying tenant. He would be secured against the discharge complained of, and that is all he asks; and it is even open to him, after he gets a verdict against the occupying tenants, to contend that this will entitle him to an interdict against the landlord also.

Respondent.—Under the circumstances in which the case was tried, and assuming the fact of nuisance to be established, the appellants were clearly liable in law to have a verdict returned against them; and the respondent, on the other hand, the nuisance being proved, was entitled to have an interdict in the terms concluded for in the summons.

The use of the water at the dye-works is to be assumed to amount in law and in fact to a nuisance. Whether by any practical remedy, and within the limits of any reasonable expenditure, it is possible to carry on the manufacture of Turkey-red dyeing in such a situation as that in which the works complained of are placed, is a speculative question into which it is unnecessary to enter. There is here an opus manufactum creating pollution and a nuisance on the

stream. It is a *novum opus*, neither acquiesced in by the lower heritor, nor sanctioned by prescription. The stream as it flows past the property of every heritor is no doubt liable to be consumed for ordinary domestic purposes, and to be turned to all lawful uses; but the stream of water is the common property of all the heritors through whose lands soever it flows. The upper heritor is not entitled either to divert its course or to diminish its quantity, excepting for fair and ordinary purposes, and is as little entitled to soil or pollute its quality. An heritor is not entitled to collect water and make it run down in a reservoir to suit his own convenience, nor can he carry water for the purpose of establishing any manufacture, without the consent of the opposite heritor. These are points fixed by express decision.¹ The limitations of the rights of the upper heritor as to pollution are regulated by the same principles.² The water, generally speaking, must be sent down to the lower heritor in the same quantity and of the same quality in which it flows into the lands of the upper heritor.³

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On looking at the sixth exception, it will be seen that the law laid down at the trial, with respect to the landlord and the principal tenant, never can be sanctioned. The learned Judge observed, that

¹ Lord Glenlee v. Gordon, 10th March 1804, Mor. p. 12,834; Ogilvie v. Kincaid, 24th November 1791, Mor. 12,824; Hamilton v. Eddington and Company, 5th March 1793, Mor. 12,824.

² Miller v. Stein, November 1791, Mor. 12,823, Bell's Cases 334; Russell v. Haig, November 1791, Mor. 12,823.

³ Skene v. Maberly, 27th November 1820, Murray's Reports, vol. ii. p. 359; Miller v. Marshall, 8th November 1828, Murray's Reports, vol. v. p. 28.

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there was nothing to connect the landlord and the principal tenant with the nuisance, excepting the lease and the sublease, that the lease was silent on the subject of Turkey-red dyeing, and the landlord not liable for any nuisance which the tenant might create not authorized by the lease; and his Lordship proceeds, "that the question then was, whether it was possible to carry on a dye-work on this stream at an ordinary profit without committing a nuisance? That the pursuer having led no evidence that this could not be done, the defenders in this second issue were entitled to a presumption in their favour, and that if the jury were satisfied in point of fact that a dye-work might be carried on in these premises without a nuisance, or that injury might be prevented without much expense, then the landlord was not liable for any negligence in the carrying on of the work; and as there was no proof to connect him or the principal tenant with the existing dye-work, except the lease, they were not responsible in law for the carrying on of that work, or for any nuisance thereby occasioned." There is much error as well as great uncertainty in the law thus laid down. In the first place, it was not incumbent on the respondent to prove the negative that a dye-work could not be carried on in this stream without creating a nuisance. No dye-work had been carried on there before. The new experiment was tried under a lease granted by one of the appellants who drew the rent stipulated by that lease, and under the sublease granted by the other appellant, who drew the profit rent in respect of this new mode of occupation

constituting a nuisance. There was no restriction or limitation as to time, manner, or extent of manufacture imposed on the tenant or sub-tenant; and although in words the lease does not directly authorize pollution and nuisance, it authorizes, for the first time, and in a new situation, every operation connected with dyeing; and the operations actually carried on under authority of that lease amount in law and in fact to a nuisance. Why should there in such circumstances be any presumption in favour of the appellants? They were not protected by any prescription, acquiescence, or mode of using the stream. They attempted a new and unheard-of use of such a stream, by authorising all sorts of dye-works at the very sources where the pure water springs. Then, what sort of ground in law is it to proceed upon, that if a dye-work could be carried on without a nuisance, "or that injury might be prevented without much expense," the landlord is not liable? What is much expense? And upon what principle of law is an upper heritor entitled to a new use of a stream for the purpose of a manufacture necessarily noxious to water, and to throw the expense of remedying the evils thereby created upon the lower heritor?

It is enough to subject the landlord, that nuisance is the probable consequence of the operation authorised by him, and for which he draws rent: Thus in the case of *King v. Moore*¹, 25th January 1832, certain premises were let for the recreation of pigeon shooting, and the effect of this was to bring various idle persons (called scouts) to the neighbourhood of the premises,

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¹ Barn. and Adolph. vol. ii. p. 184.

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and who committed trespass on the adjoining grounds. The landlord was held liable to indictment, although he in no way sanctioned such resort, and derived no direct profit from these scouts. The principle upon which the judgment of the Court proceeded is thus expressed by Mr. Justice Littledale:—"It has been contended, that to render the defender liable it must be his object to create a nuisance, or else that that must be the necessary and inevitable result of his act. No doubt it was not his object; but I do not agree with the other position, because if it be the probable consequence of his act, he is answerable as if it were his actual object. If the experience of mankind must lead any one to expect the result, he will be answerable for it." It cannot be doubted that the probable consequence of the establishment of the dye-works complained of was to cause that pollution and nuisance in the stream which ex concessis of the present argument actually exists. The liability of the landlord in all the consequences necessarily follows.

The argument of the appellants against liability for damage cannot affect the present question in the least, although, on the other hand, if the responsibility for damage does attach to them, it follows a fortiori, that they are bound to submit to an interdict against the wrongful use of the stream.

LORD CHANCELLOR.—My Lords, this was an action of interdict against continuing a nuisance to some water-course or grounds, and the suit was against Hamilton the landlord, Arthur who was the immediate lessee, and Macdonald and others who were the actual occu-

piers of the premises in question. The Court of Session directed two issues to be tried: the first issue was, whether Macdonald, that is the occupying tenant, did, by certain operations carried on upon the premises, wrongfully pollute and spoil the water, to the nuisance of the pursuer; the second issue was, whether Hamilton or Arthur, by themselves, or another or others authorized by them, did wrongfully pollute and spoil the water to the nuisance of the pursuer. The fact of nuisance is the same upon both issues; and if the jury found in the negative, there must have been a verdict for the defendants upon both; but if they found in the affirmative upon the first issue, Hamilton and Arthur might have obtained a verdict upon the second, if they could have proved that the act which constituted the nuisance was solely the act of the tenant, and in no manner authorized by them.

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Lord Jeffrey, the Judge before whom those issues were tried, in describing what constituted a nuisance, described it in terms which the Court of Session have thought not to be properly applicable to the subject, and the Court of Session directed a new trial upon the issue, and upon that there is no question before your Lordships. He also addressed the jury with respect to the second issue, namely, that issue which affected the liability of the landlord and of the immediate lessee; and upon that issue the summing up was as follows, which constitutes the sixth exception taken upon the bill of exceptions:—"and the said Lord Jeffrey
 " did further direct the jury, in point of law, that with
 " respect to the liability of the landlord and principal
 " tenant under the second issue, assuming that there
 " had been actual nuisance proved, as there was nothing

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“ to connect these defenders with the supposed nuisance
“ but the lease and sub-lease granted by them respec-
“ tively, there was no ground in law for holding that
“ they or either of them had authorized or were
“ answerable for that nuisance: That the other defenders,
“ the persons in occupation, did not stand in relation
“ of agents or servants of the landlord or principal
“ tenant, and that although they might have misused
“ the manufactory the landlord was not liable for a
“ nuisance by the tenant in occupation unless that
“ nuisance had been sustained by him: That as in this
“ case the lease said nothing as to Turkey-red dyeing
“ but simply related to dyeing, which did not mean the
“ establishment of any dye-work poisonous to the water,
“ this did not imply a license to carry on the dye-work
“ in such a way as to be a nuisance. The question then
“ was, whether it was possible to carry on a dye-work
“ on this stream, at an ordinary profit, without com-
“ mitting a nuisance? That the pursuer having led no
“ evidence that this could not be done, the defenders
“ in this second issue were entitled to a presumption
“ in their favour; and that if the jury were satisfied, in
“ point of fact, that a dye-work might be carried on in
“ these premises without a nuisance, or that injury
“ might be prevented without much expense, then the
“ landlord was not liable for any negligence in the
“ carrying on of the work; and as there was no proof
“ to connect him or the principal tenant with the
“ existing dye-work, except the lease, they were not
“ responsible in law for the carrying on of that work,
“ or for any nuisance thereby occasioned.” The result
was, the jury found a verdict in the negative upon both
the issues.

Now, my Lords, that part of the summing up of the learned Judge which formed the subject of the four first exceptions, which were allowed by the Court, and with respect to which there is no appeal, was calculated, in my opinion, to lead the jury by misdirection in point of law, as afterwards was held by the Court of Session, to negative the fact of nuisance altogether. As to that part which related to the landlord's liability, the learned Judge told the jury that though they should find that there was a nuisance, yet as the lease only related to dyeing, and there was nothing else to connect the landlord with the nuisance, he was not responsible if the jury should be of opinion that a dye-work might be carried on at the ordinary profit without committing a nuisance, or that injury might be prevented without much expense. Upon the four first exceptions the Court appears to have entertained no doubt but that the direction was wrong, and accordingly ordered a new trial; but they doubted upon the sixth, and by a majority of three to one they ordered a new trial upon the second issue. Lord Gillies and Lord Corehouse seem indeed to have proceeded much upon the ground that the landlord had, by his defence, complicated himself with the case of the tenant, by denying the existence of nuisance. But to negative the fact of nuisance was a necessary part of this case, because success upon that issue would have entitled him to a verdict, without entering upon the question of his liability as landlord; but he, having two grounds of defence, was by no means bound to rest upon the latter only. Besides which, if his having so pleaded ought to have led to such a conclusion, the first issue ought to have been made to apply to both landlord and tenant; whereas, by directing

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the second issue, it seems to have been assumed that the landlord might have a defence, although the fact of the nuisance should be established. The two issues having been directed, it does not appear to me that those considerations could operate upon the question of the propriety of the summing up of the learned Judge; and upon the trial of the bill of exceptions, the learned Judge upon the second issue put the question to the jury, upon the supposition that the nuisance had been established. But that was not what the jury had to try—at least not all which they had to try—upon the second issue; they had to try the fact of nuisance, and also whether the landlord had authorized it. Had they found either in the negative, there must have been a verdict for the defendant; but if, not regarding the direction of the learned Judge as to the liability of the landlord, they thought that he had authorized whatever the tenant had done, yet, consistently with the learned Judge's direction upon the question of nuisance, they could not have found for the pursuer. His direction, therefore, upon the question of nuisance necessarily entered into his direction upon the second issue; and if he was wrong upon that, the error may have led to the verdict upon the second issue. The jury might well have said, adopting the learned Judge's direction as to the landlord's liability, We find that the tenant might have carried on his business so as to avoid what the Judge has described to us as a nuisance in point of law, without much expense, and obtaining a reasonable profit; but they might have come to a very different conclusion if they had contemplated the fact of nuisance, not as the learned Judge had described it to them, but

as the Court of Session thought it ought to have been described. Therefore, if his direction as to the landlord's liability had been altogether correct, I should have thought a new trial upon the second issue must necessarily have accompanied a new trial upon the first.

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But then the question remains, whether the direction of the learned Judge as to the liability of the landlord can be maintained? The lease to Arthur is for the purpose of bleaching, dyeing, or printing, or any other operations connected with dyeing, bleaching, or printing. If the operations connected with bleaching, dyeing, or printing would, in the ordinary course of business, create a nuisance, is the landlord to be irresponsible because the tenant might, by possibility, have avoided the nuisance, and yet have obtained a reasonable profit, or have prevented the injury without much expense? There is no such distinction to be found in the doctrine laid down in *The King v. Moore*, in 2 Barnwall and Adolphus, p. 184, or *The King v. Pedley*, in 3 Neville and Manning, and no author in Scotland is cited to support the rule as laid down by the learned Judge. How far what actually took place is to be considered an operation connected with bleaching and dyeing or printing, according to the terms of the lease, was a question of fact to be determined by the jury, and one of the highest importance in determining the liability of the landlord; but the learned Judge told the jury, that there being nothing but the lease to connect the landlord with the nuisance, there was no ground in law to hold him responsible.

It was argued that the Court of Session, having allowed the bill of exceptions upon the first issue, were

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bound to direct a new trial of the whole, including the second issue. It does not appear to me necessary to enter into that question; because, whether the rules of courts of law in this country upon bills of exceptions, or the rules of courts of equity in directing issues, ought to be the rules of the Court of Session, it appears to me clear, that upon either supposition a new trial upon the second issue would have been proper; first, because the erroneous direction upon the question of nuisance necessarily affected the decree upon the second issue as well as upon the first; and, secondly, because the direction as to the landlord's liability restricted the landlord's liability within limits which I conceive cannot be supported.

I therefore move your Lordships that the interlocutor of the Court of Session be affirmed.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutor, so far as complained of, be and the same is hereby affirmed.

RICHARDSON & CONNELL—ARCH. GRAHAM, Solicitors.

[16th August 1838.]

JOHN BOYLE GRAY, Appellant.—*Attorney General*
(*Campbell.*)

The Rev. JOHN FORBES and others, as representing the
Session of the Outer High Church, Glasgow, Re-
spondents.—*Sir William Follett—Adam Anderson.*

Appeal.—In an action against a Town Council and the
councillors, nominatim as councillors “and for them-
“ selves,” decree was pronounced in terms of the libel,
and for expenses,—Held, that one of those councillors
was entitled to present a petition of appeal, although
the Town Council declined to appeal.

THE Rev. Dr. Andrew Bell, by a deed of indenture dated 14th July 1831, executed between him and certain parties as trustees, invested in those trustees certain large sums of money, on the recital that “whereas
“ the said Andrew Bell, (the author of the system of
“ education called the Madras system,) considering
“ that the progress of the said system in his native
“ country of Scotland hath hitherto been slow and
“ imperfect, and that the greatest boon which he can
“ confer on that country is by taking measures for the
“ more effectual diffusion of the said system therein,”
&c.; therefore the trustees were taken bound to divide
the funds into twelve equal parts, and to transfer one
twelfth part to the provost, magistrates, and town council
of Glasgow, upon this condition, that the money so

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transferred “ be by them and their successors employed for the founding or maintenance of a school “ or schools” in that city, “ for the instruction of “ children, whether male or female, or both, in the “ ordinary branches of education; but so that the “ tuition of every one of the said schools be upon the “ system of mutual instruction and moral discipline “ exemplified in the Madras school;” and that the magistrates and council should “ stand possessed of the “ stock so to be transferred to it as aforesaid, upon trust “ for ever to apply the dividends and interest thereof in “ the support and maintenance, from time to time, of “ schools already founded or hereafter to be founded “ on the principles of the aforesaid Madras system; “ such funds either to remain as invested, or to be “ invested on any government, heritable, or other “ sufficient securities, as shall from time to time be “ thought fitting.” They were required to make and execute a declaration and acknowledgment of the acceptance of the several trusts; and it was provided, that if they should refuse to execute such declaration of trust, then the share of the trust funds should be transferred to the provost, magistrates, and town council of Cupar in Fife, &c.

The magistrates and town council of Glasgow, having accepted of this trust on 18th November 1831, received 9,721*l.*, and executed a declaration of trust, binding themselves “ that we and our successors in office shall for “ ever apply the dividends and interest of the foressaid “ sums, or of the proceeds thereof, in the support and “ maintenance, from time to time, of a school or schools “ already founded or to be founded in the city of “ Glasgow on the principle of the system of mutual

“ instruction and moral discipline as exemplified in
 “ the Madras school, or in what is known by the name
 “ of the Madras system.”

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Thereafter separate contracts were entered into in October 1838 between the town council, on the one hand, and the kirk sessions of the established church in Glasgow on the other. By that, with the Session of the Outer High Kirk, it was “ agreed between
 “ the said first party and the several kirk sessions
 “ of Glasgow, that, in order the more extensively
 “ and effectually to promote the system of education
 “ contemplated and prescribed by the Rev. Dr. Bell,
 “ the annual interest or proceeds of the said two
 “ sums not vested in government securities should
 “ be equally divided among and paid over half-yearly
 “ to the different kirk sessions upon their severally
 “ executing these presents. Therefore the said second
 “ party, as representing the foresaid outer high kirk
 “ session, and as taking burden on them as aforesaid,
 “ do hereby bind and oblige themselves and their
 “ successors in office to lodge, in writing, with the
 “ secretary of the said first party a distinct vidimus
 “ or statement of the proposed application of the pro-
 “ portion of the annual interest or proceeds of the said
 “ two sums falling to be paid to the said second party,
 “ showing definitely that the same is to be strictly
 “ applied in the promotion of the system of education
 “ prescribed by the donor, the Rev. Dr. Bell, and
 “ accompanied by an obligation binding the said kirk
 “ session to apply the same accordingly; declaring, as
 “ it is hereby provided and declared, that so long as
 “ the said second party shall continue to furnish an
 “ annual statement or vidimus and obligation before

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“ mentioned, and shall from year to year satisfy the
 “ said first party that the same have been followed out
 “ and carried into practical execution, the said second
 “ party and their successors in office shall be entitled
 “ to draw the proportion before mentioned of the
 “ foresaid annual interest or proceeds from the said
 “ first party; but in the event of the said second party
 “ failing to lodge the said annual statement or vidimus
 “ and obligation, or failing to satisfy the said first party
 “ of the same having been carried into effect, they
 “ shall forfeit their right to the proportion of the said
 “ interest or annual proceeds falling to be paid to the
 “ said kirk session; and the said first party shall be
 “ entitled to apply the same as fully and freely as if
 “ these presents had never been executed. Farther,
 “ the said second party bind and oblige themselves
 “ and their successors in office to hold annual ex-
 “ aminations of the schools to be established and main-
 “ tained, either partially or totally, by the proportion
 “ of the interest or annual proceeds payable to them as
 “ before mentioned, and to give to the secretary of the
 “ said first party at least six days previous notice of
 “ the time fixed for that purpose, so that the said first
 “ party, one or more of them, may have an opportunity
 “ of attending the said examinations, and becoming
 “ satisfied of the bonâ fide and legitimate application
 “ of the foresaid annual interest or proceeds, and par-
 “ ticularly that the same are applied agreeably to these
 “ presents, and strictly in terms of the deed of donation
 “ executed in favour of the said first party by the said
 “ Rev. Dr. Bell.”

Nine other similar contracts were entered into with
 the kirk sessions of the remaining nine ecclesiastical

districts into which, together with the outer high church district, the town of Glasgow is, quoad sacra, distributed.

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Each of the ten sessions lodged with one of the depute clerks of the city a separate vidimus or obligation, in terms of the contract,—that lodged by the respondents (which was identical with all the others) being as follows:—"In terms of the contract entered "into between the lord provost, magistrates, and "town council of Glasgow, on the one hand, and the "session of the outer high church on the other hand, "of date the 16th and 28th days of October 1833, the "said session hereby undertake that there shall be "conducted, under their inspection, a school or schools "(i. e. one or more, but one at the least) for teaching "English reading, grammar, and religious knowledge, "with such other branches of education as may be "required, said school or schools to be divided into "classes, over each of which a monitor shall preside, "and under the charge of a master or masters appointed by the kirk session, and for whom they shall be responsible, and that the sum of at least 50*l.* shall be expended in instituting and carrying on said school or schools during the period of twelve months from this date."

These contracts were approved of and ratified by Dr. Bell's trustees.

On the election of a new town council under the reform act they declined to fulfil the contracts, alleging that they were not in accordance with the trusts under which the money came into the hands of the corporation. An action was therefore brought before the Court of Session by the respondents as representing

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the session of the Outer High Church of Glasgow, in which they concluded, that “although the pursuers have frequently desired and required the said Lord Provost, magistrates, and town council of the city of Glasgow to fulfil their part of the said contract, by making payment to the pursuers of their said shares of the said dividends, in terms of the said contract, yet they refuse or delay so to do; therefore the said lord provost, magistrates, and council of the city of Glasgow, and the Hon. William Mills, lord provost, William Gilmour, James Lumsden, John Fleming, William Craig, and John Small, Esqrs., bailies, James Martin, Esq., dean of Guild, Archd. M'Lellan, Esq., deacon convener, and Messrs. Hugh Tennent, Robert M'Gavin, James Turner, John Boyle Gray, Alexander Dennistoun, William Bankier, John Ure, Alexander Johnstone, James Wallace, Henry Brock, Robert Hutcheson, John Mitchell, John Douglas, James Hutcheson, Robert Dalgleish, Henry Paul, Henry Dunlop, William Dixon, David Hope, Alexander Denny, George Orr, John Leadbetter, John Pattison, and William Robertson, councillors, for themselves and as representing the burgh and community of Glasgow, ought and should be decerned and ordained by decree of the Lords of our Council and Session to make payment to the pursuers of their portion, being one tenth part or share of the annual interest, proceeds, or dividends which have already accrued or may hereafter accrue on the foresaid two sums of 4,895*l.* 16*s.* 8*d.*, making together 9,791*l.* 13*s.* 4*d.*, transferred to the said defenders as above mentioned, and that half-yearly, agreeably to and in the terms of the contract between

“ between them and the said pursuers before narrated,
 “ in all time coming, so long as the pursuers shall fulfil
 “ and observe their part of the said contract, with the
 “ legal interest of the said annual proceeds, interest, or
 “ dividends from and after the terms of payment
 “ thereof till payment; superseding the execution, so
 “ far as regards the proceeds or dividends not yet due,
 “ till the terms of payment shall be first come and
 “ bygone, and deducting the payment already made by
 “ the said defenders to the said pursuers as before
 “ mentioned: And farther, in respect the said defend-
 “ ers have violated their said contract or agreement,
 “ and have failed to implement the same, they ought
 “ and should be decerned and ordained by decree
 “ foresaid to make payment to the pursuers of 100*l*.
 “ sterling, being the liquidate penalty in that case
 “ stipulated and provided, together also with 100*l*.
 “ sterling, or such other sum, less or more, as our said
 “ Lords shall modify in name of expenses of process,
 “ over and above the expenses of the decree to follow
 “ hereon; conform to the said contract, laws, and daily
 “ practice of Scotland used and observed in the like
 “ cases in all points as is alleged.”

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The Lord Ordinary assoilzied the defenders from the
 action, but the Court on 21st February 1837 altered, and
 found “ that the agreement libelled between the pur-
 “ suers and defenders is in due conformity with the trust
 “ deed of the late Dr. Bell, and a valid and effectual
 “ agreement, and therefore decern against the de-
 “ fenders in terms of the conclusions of the libel:
 “ Find the defenders liable to the pursuers in expenses,
 “ and remit the account thereof, when lodged, to the
 “ auditor of Court, to tax the same, and report,—with

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“ this declaration, that no part of the expense of this
“ litigation shall form a charge on the trust funds of
“ Dr. Bell.”¹

Thereafter the Court decerned against the defenders for the sum of 144*l.* 11*s.* as the amount of expenses found due, and for the expense of extract.

The magistrates and town council declined to enter an appeal against these judgments; but the appellant, who was a member of the town council and nominatim concluded against in the summons, presented a petition of appeal, whereupon the respondents applied to have it dismissed as incompetent. This question was ordered to be argued in cases and at the bar.

Appellant.—According to the sound construction of the trust deed each of the individual members of the town council is vested with the rights and duties of a trustee, and is therefore entitled to challenge all acts which he deems to involve mal-administration, and consequently to appeal against a judgment which he holds as sanctioning such acts. This rule was established in the case of *Anderson and others v. the Magistrates of Renfrew*², in that of *the Merchant Company and Trades of Edinburgh v. the Magistrates*³, in *Christie and others v. the Magistrates of Stirling*⁴, and in *Johnston and others v. the Stentmasters of Kelso*.⁵

The same doctrine has also governed the most recent

¹ 15 D., B., & M., 628.

² 30th June 1752, Mor. 16122.

³ 9th Aug. 1765, Mor. 5756.

⁴ 6th July 1774, Mor. 5755.

⁵ 25th June 1800, Mor. voce Title to Pursue, App. No. 1.

decisions. In the case of *Mill v. the Magistrates of Montrose*¹ it was held that an individual burgess had a title to pursue a reduction of a warrant by the King in Council for the restoration of the sett of the burgh after disfranchisement, which warrant made alterations upon the sett, and also of the elections under that warrant, although the first election under it was not challenged. So in the case of *Bow and others v. the Magistrates, Town Council, and first Minister of Stirling, patrons of Cowan's Hospital*² it was decided, that "when funds are mortified for the benefit of a certain number of the members of a corporation to be selected by the patrons and managers of the charity, the corporation itself, or any individual member of it, is entitled to pursue an action of reduction and damages against the patrons for mismanagement of the funds of the charity." And in *Goddard v. the Leith Dock Commissioners*³ it was decided that a "member of a board of commissioners elected under authority of an act of parliament is entitled to pursue a reduction of an act done by the board, on the ground of its having been carried by the votes of two commissioners who were disqualified, without his being obliged to conclude for reduction of the appointment or commission in virtue of which these persons acted."

Now, in the present instance, the acts which the judgment has sanctioned, and for which the appellant seeks redress, are unquestionably acts of extraordinary

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¹ 28th January 1824, 2 S. & D. 652; (new ed. 549); and 1 Wilson & Shaw's App. Cases, p. 570.

² 6th Dec. 1825, 4 S. & D., p. 276, (new ed. 280.)

³ 14th Feb. 1827, 5 S. & D., p. 355, (new ed. 329.).

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administration. He has also an interest as a trustee that all those acts, if unsound and injurious, should be so declared to be, in order that no detriment may arise to the trust, which he is bound to administer lawfully and beneficially. And he has an interest, not merely as a corporator or trustee, but as one of that community for whose benefit the trust was created; for the appellant was called in the action, both in his capacity of a councillor and trustee, and as an individual.

But separately the appellant is, both at common law and by statute, personally subjected to the responsibilities and liabilities of a trustee, and is therefore entitled to take all steps necessary for his protection; and accordingly the action is directed against the appellant as an individual, and by the judgment of the Court of Session he has been found to be, as such, subject to responsibilities and liabilities relating to the trust generally, and more especially for payment of the expenses of the action, which it is declared shall not be paid out of the trust funds.

Respondents.—The action was raised and executed, according to the forms of the law of Scotland, solely against the lord provost, magistrates, and town council of Glasgow, as a corporation, and no appearance was made except by this corporation, who are the sole parties to the record in the Court below; therefore it is not competent for any individual, whether a member of this corporation or not, to enter appearance for the first time in the House of Lords, and to bring the judgments up for review by appeal in his own name.

That this was an action directed solely against the corporation is manifest from the fact that it was founded upon a contract entered into with the corporation, relates exclusively to funds held by the corporation as trustees, and its conclusions are, that the defenders should be ordained to pay to the pursuers the interest or proceeds of those funds held by the corporation.

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They are mentioned as lord provost, bailies, dean of guild, deacon convener, and councillors respectively; and it is in these characters alone that they are concluded against “for themselves and as “representing the burgh and community of Glasgow.” The reason for the specification of the names and characters of the individuals is, that by the law of Scotland a summons against a corporation can only be served, either when the corporation is met for the despatch of business, by delivering a copy to the head or chief member of the corporation, in presence of the other members, or by serving a copy individually upon each member or office-bearer of the corporation. As a warrant to the messenger or officer for this last method of executing the summons, it is necessary to specify the names of all the individual members upon whom it must be served, so as to call the corporation legally into Court.¹

Under such a summons no judgment could be pronounced against any member of the town council in his individual capacity, or in any other character than as a member of the town council.

So firmly has this practice been established that in

¹ Juridical Styles, vol. iii. p. 6, ed. 1828.

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the case of *Clarkson v. the Magistrates of Edinburgh*¹, it was held a sufficient objection to a summons, that it was directed against the magistrates only in their official character, and not against all the other members of the town council.

It was even thought, in one case, to be a valid objection to an action raised against a corporation created by a British statute, that the corporation was called only by its corporate name as a defender. *Murray v. York Buildings Company*.²

In the case of the *Burgesses of Rutherglen v. Leitch*³, “a summary complaint against magistrates of a burgh was cast, in respect the whole names of the pursuers and defenders were not inserted in the executions.” Where it is the intention of a pursuer to raise an action, and to call into Court the magistrates of a burgh, both in their official character and as individuals, the form of summons adapted for this purpose is altogether different from that now in question. In such a case the conclusion is against the parties, “not only as magistrates, and as representing the community of the said burgh and their successors in office, but as individuals and their heirs and representatives.”⁴

It is also shown by the execution of the messenger that the citation was against the corporation only; for the citation was given by delivering the service copy “to the Lord Provost, for himself and on behalf of the said magistrates and town council, when they were in council assembled, and met for managing or

¹ 9th June 1743, Mor. 2538.

² Jan. 1733, Mor. 3780.

³ 8th July 1747, Mor. 3689.

⁴ *Juridical Styles*, vol. iii. p. 79.

“transacting the affairs of the said burgh and community within the town hall or ordinary place of meeting,” &c.

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Accordingly the defences were put in “for the lord provost, magistrates, and town council of the city of Glasgow;” and when the record came to be made up the answers and revised answers were in like manner put in “for the lord provost, magistrates, and town council of the city of Glasgow;” and the record was authenticated and closed by the Lord Ordinary, in terms of the statute, as between the present respondents and the lord provost, magistrates, and town council. No appearance was made or could competently be made in the Court below by the appellant Mr. Gray, or by any other individual member of this corporate body.

But, it has long been fixed in the law of Scotland, that no individual member of a town council can competently complain of any act of the corporation, whereby a benefit is conferred upon some third party. This was decided by the Court of Session in the case of *Cuninghame v. Magistrates of Edinburgh*, 3d December 1800.¹ It would seem to follow, a fortiori, that no individual member of such corporation can interfere in any litigation carried on between the corporation and any third party.

If the appellant could show, that as one of the defenders in the action, and interested as one of the trustees or guardians of the fund, or as a private individual, any claim could possibly be made against him, under the judgments in question, the respondents

¹ No. 7. Ap. Mor. voce Burgh Royal.

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could understand his title to bring these judgments under review, so far as he is concerned; and had he prayed this House to reverse or vary the judgments complained of, so far as they affect him, or could authorize any demand against him, either as one of the defenders in the action or as a private individual, the respondents could have had no interest in opposing such an appeal. But such is not the nature of his appeal. His object is to have the judgment pronounced against the corporation reviewed, although the corporation have acquiesced in it.

If the corporation have acted improperly in not bringing these judgments under review, or if the appellant could show that, either as an individual member of the town council, or as a private individual, he is entitled to complain of any undue benefit conferred upon the respondents, he may be entitled by an action at his own instance, directed against the corporation, or against the respondents, to have the rights which, he alleges, belong to him, declared; but he has mistaken his proper remedy in presenting an appeal.

LORD CHANCELLOR.—My Lords, there was a case which came before your Lordships sometime since upon a question of competency. The case arose upon a certain sum of money transferred to certain parties for the purpose of encouraging the establishment of schools in several of the large towns in Scotland. Certain sums were assigned to the town of Glasgow for that purpose, and the corporation of Glasgow carried that into effect by making a division of that money and appropriating it to certain kirk sessions of several of the parishes of the town. That was not allowed by the

individuals who afterwards constituted the corporation, and they withheld the payment from those kirk sessions, which gave rise to a suit by one of the kirk sessions for the purpose of recovering payment of what they considered to be due to them. The question turns entirely upon the form in which that suit was instituted, which was followed by an interlocutor of the Court of Session giving relief in the terms of the summons.

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The summons prayed that the corporation of Glasgow by their legal designation, and also various other persons constituting the town council of Glasgow, and amongst others John Boyle Gray (who is the party appealing to your Lordships House), "for themselves, and as representing the burgh and community of Glasgow," should be decerned to pay that portion of the money which the kirk session thought they were entitled to receive, and that they might also pay the expenses which had been incurred in the attempt to recover it. When that case came before the Lord Ordinary an interlocutor was pronounced, and there was afterwards a reclaiming note to the First Division of the Court of Session, and the interlocutor as finally made by the Court of Session was as follows:—"Find that the agreement libelled "between the pursuers and defenders is in due conformity with the trust deed of the late Dr. Bell, and "a valid and effectual agreement, and therefore decern "against the defenders in terms of the conclusions of "the libel: Find the defenders liable to the pursuers "in expenses, and remit the account thereof, when "lodged, to the auditor of Court, to tax the same, "and report,—with this declaration, that no part of "the expense of this litigation shall form a charge "on the trust funds of Dr. Bell."

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My Lords, the corporation of Glasgow have not appealed against that interlocutor. So far, therefore, as the corporation were defenders in that suit, there is no question before your Lordships. But one of the town-councillors of that town, namely, the present appellant Mr. Boyle Gray, presented an appeal, and a petition was then presented by the respondents, alleging that it was not competent to that individual to appeal against this interlocutor. The real question is, whether there is any thing in the interlocutor pronounced which gives Mr. Boyle Gray a right of appeal?

It was argued at your Lordships bar, and it was contended that he had a right to appeal as to the whole merits of the interlocutor. Another ground contended for was, that he had a right to appeal, because he was subject, personally and individually, to costs and responsibilities by the terms of the interlocutor pronounced. On the other hand, it was argued, that this was the usual form of proceeding against corporations in Scotland; that it is usual, not only to name the corporation, but to name the individual members of the corporation, and the reason of that was stated to be, because if the pursuer found the corporation sitting in their corporate capacity he had a right to serve the officer presiding at that meeting; but if he could not find him in that situation, then the only way that he had of bringing the matter before the Court was by serving each individual member constituting the corporation. And therefore it was alleged that a practice had prevailed in Scotland of naming the individuals who constituted the corporation; and undoubtedly there appears to be authority for that proposition. But to that it was answered, that if that were so the individuals

should be named as constituting the corporation; whereas in the summons here they are named, and then it is prayed that they, "for themselves, and as " representing the burgh and community of Glasgow," might be ordered to pay the sum of money claimed by the pursuers; and although the interlocutor does not in terms repeat those expressions, yet the interlocutor is in the terms of the summons. Your Lordships therefore must consider that the interlocutor adopts the terms of the summons, and that the interlocutor appealed from is an interlocutor which not only gives judgment against the corporation as such, but, after naming the individuals as parties to the suit, it gives judgment against them "for themselves and as representing the burgh."

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Now, if your Lordships should be satisfied, as is contended on the part of the pursuers who are respondents in this case, that it would not subject Mr. Boyle Gray to any personal responsibility, your Lordships probably would be of opinion that it was not competent for him to appeal. But I confess upon looking through the papers, and on referring to the authorities which have been cited, I cannot satisfactorily come to that conclusion. The whole proceeding is very different from that which prevails in this country. If it be the practice in Scotland to name the particular individuals, it cannot be necessary to name them as component parts of the corporation, except to pray relief against them for themselves as well as representing the corporation.

In the papers printed by the respondents they state a case in which it was held that the individual members were responsible; and they quote this as proof that,

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according to the terms of this interlocutor, the individual would not be responsible. Now, the way in which the interlocutor was framed in the case which they say made the magistrates the members of the corporation individually responsible was this: As against the magistrates, not only as magistrates and as representing the community and burgh and their successors in office, but against them as individuals. Now, the distinction between them as individuals and as parties for themselves, as well as representing the burgh, is undoubtedly very fine. No authority is quoted for the purpose of showing that that variation of phrase would make any difference in the liability of the parties; therefore I cannot say that I am at all satisfied that there is nothing in this interlocutor which can affect the individual who is now appealing; and if your Lordships should be of that opinion, then it will be a matter of course that the party should be permitted to come to your Lordships bar for the purpose of asking for some variation in the form of that interlocutor.

But, my Lords, I am anxious that the party appealing should not be induced to indulge any false hopes of success in that which appears to be the main point of his contention, because your Lordships do not think it expedient to dispose of this case on a question of competency. He comes here wanting, he says, to relieve himself from his personal responsibility; but he also comes here for the purpose of discussing the question which has been decided in the Court below between the two parties, namely, the kirk session and the corporation of Glasgow. Now I do not enter into that part of the case. It is probable that your Lordships may have that to consider at another time. But nothing

which your Lordships may do upon this question of competency ought to encourage any expectations in favour of the appeal which he, as an individual member of the corporation, is bringing to your Lordships bar for the purpose of raising a question, not as affecting himself individually, but as affecting a question between the pursuers, the kirk session, and the corporation of Glasgow, of which he is only an individual member. All that your Lordships have at present to do is to consider whether the case is so clearly made out that the individual in question is not liable to any responsibility from the interlocutor which has been pronounced; whether your Lordships can safely dismiss the case from your bar as being a case which the party is not competent to bring. My Lords, I come to the conclusion that there is evidence that he may be individually responsible for that which the Court of Session has done, sufficient to entitle him to come here in respect of that personal liability.

My Lords, I should have stated that the interlocutor of the First Division of the Court of Session not only decrees the payment to the kirk session of certain sums of money, and that as against the defenders generally, but it directs the payment of expenses, and then provides that those expenses shall not on any account come out of the charity fund devoted by Dr. Bell to the establishment of those schools. It appears, therefore, that whoever may come under the denomination of defenders must be the parties who are to pay the money, and who are to pay the expenses; and your Lordships find not only the corporation defenders, but the several individuals who are named, being the individual members consti-

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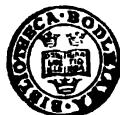
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tuting the corporation. Under these circumstances it appears to me that the only safe course to take would be to dismiss the petition, which prays that the appeal may be dismissed as incompetent. But as the same question may come on to be heard again, and as it is uncertain what may then be brought under your Lordships consideration, or to what conclusion your Lordships may then come, I think that the right course would be to reserve the costs till the case be heard. If the party does not think fit to prosecute the appeal, then the other party will apply to your Lordships for the costs attending this petition.

The House of Lords ordered the respondents' petition to be dismissed, and the appeal to be sustained; costs to be reserved until the hearing of the appeal.¹

¹ Minutes of Proceedings, 16th day of August 1838.

ARCHD. GRAHAME—SPOTTISWOODE & ROBERTSON,
Solicitors.



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INDEX OF MATTERS
CONTAINED IN
THE THREE VOLUMES.

NOTE.—The Roman Capitals refer to the Volumes, the Figures to the Pages.

ABSENCE. See *Decree in Absence*.

ACCOUNT.

Circumstances in which after accounts had been allowed to lie over for twenty years before bringing an action,—Held (affirming the judgment of the Court of Session) that the accounting was to be limited to the matters contained in the accounts, and the onus thrown on the party objecting to disprove the charges objected to. *Rose v. McLeay*, July 14, 1837, - - Vol. II. p. 958.

ADVOCATION. See *Process*, 11.—*Jurisdiction*.

AGENT AND CLIENT.

Circumstances under which, although the accounts of a law agent which had been rendered with a view to an extra-judicial settlement, were remodelled when the client required a taxation, and the remodelled accounts contained fictitious charges, (but which had been inserted by a third party employed to remodel them, and were afterwards withdrawn,) and 219*l.* was taxed off 819*l.*, the House of Lords affirmed with variations the judgment of the Court of Session, decerning for the balance with expenses. *McAulay v. Adam and Brown*, May 7, 1835, - - I. 665

AGENT AND PRINCIPAL.

A party who held, in trust for himself and another, an heritable security over the estate of his debtor, and was appointed one of his testamentary executors, and at the request of other creditors agreed, with a view to save expense, to receive the proceeds of the debtor's estate, and distribute the same, without making any stipulation for commission:—Held (affirming the judgment of the Court of Session) not entitled to commission. *Roberts v. Court and others*, July 25, 1838, - - III. 317

APPEAL. See *Process*.

APPRENTICE. See *Master and Servant*.

ANNUITY. See *Husband and Wife*, 4.—*Rei Interventus*.

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ARBITRATION.

1. An action of count and reckoning, concluding for 500*l.*, or such other sum as should be found to be the balance due, was judicially referred, with a declaration that the referee should ordain the losing party to pay all costs; and the referee found the pursuers entitled to 4*l.* 3*s.* 11½*d.* as the balance unaccounted for on transactions to the amount of 45,542*l.*, but declared the pursuers to be the losing parties, and liable in expenses:—Held (affirming the judgment of the Court of Session) that the award was not ultra vires; but declaration added (by the House of Lords) that the judgment should not be drawn into a precedent on the general meaning of the words "losing party." *Gye & Co. v. Hallam*, May 15, 1835, - - - 1.747
2. A company brought an action against one of its partners for two calls upon his stock, and he raised a counter action of damages against the company, for the market price of his stock, as at a certain date, in respect the company had without his consent abandoned their business, and united themselves with another company; and these actions were referred to a judicial referee, who found that the company was entitled to decree for the calls, and that the partner was entitled to decree for a certain sum as the price of his shares, which sum (under deduction of the calls) he was entitled to recover on transferring his shares of stock to the company:—Held (reversing the judgment of the Court of Session), 1, that in the action at the instance of the company the award of the referee could not be confirmed except as to one of the calls, in respect that both the calls proposed to be decerned for had been made at one time, whereas, by the statute incorporating the company, a month ought to have elapsed between them: 2, that in the action at the instance of the partner against the company the award was inconclusive, inasmuch as it did not bind the partner to convey his shares to the company, but only made the recovery of the sum awarded to him conditional on his doing so.—Question, Whether an error in law forms a good objection to a decree arbitral? *Clyne's Trustees v. Edinburgh Oil Gas Light Company*, August 27, 1835, - - - - II.243

ASSIGNATION. See *Lease*, 3.

BANK. See *Cautioner*, 2.

BANKRUPTCY.

1. (1.) Circumstances under which a transaction entered into by creditors on a sequestrated estate, for taking a lease of part of a coal field adjacent to and forming part of a coal field belonging to the bankrupt, with a view to the beneficial working of the coal, was, in a question with the bankrupt and his wife as a contingent creditor, sustained. (2.) Where a question as to compromising claims on a sequestrated estate, and counter claims by the bankrupt by executing mutual discharges, had been repeatedly under consideration of meetings of creditors, and the

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BANKRUPTCY—continued.

matter was adjourned for further consideration, an objection by the bankrupt and his wife to a resolution of a meeting of the creditors to enter into the compromise, that the advertisement did not specially bear that the meeting was called for this purpose, repelled. *Taylor v. Kerr*, April 8, 1835, - - - I. 94

2. A party lent a sum of money on the security of a property which he was led to believe extended to ninety-five acres, but which, from the terms of the description, embraced only five acres; and after the borrower was bankrupt, and his estates had been sequestered, and a trustee confirmed, and he had fled to another country, the lender obtained from him an heritable bond, embracing the lands originally intended to have been conveyed in security, on which infestment was taken before the trustee was infest:—Held (affirming the judgment of the Court of Session) that the heritable bond so obtained was inept in a question with the trustee. *Inglis, &c. v. Mansfield*, April 10, 1835, - - - I. 203

3. A party lodged a claim and affidavit with the trustee on a sequestered estate, and the bankrupt presented two petitions for approval of composition, which he founded on the concurrence of the claimant for the amount claimed, but they were refused:—Held (affirming the judgment of the Court of Session), 1, that the bankrupt was not, at the distance of twenty years, entitled to throw on the claimant the onus of proving the items of the claim to be correct, but that the presumption of law was, that it was correct; and, 2, that the claimant was entitled to maintain an action against the bankrupt, notwithstanding the sequestration was still in dependence. *Cunningham v. Dod's Trustee*, July 17, 1837, - - - II. 984

See *Cautioner*, 1.—*Trust*, 1.

BILL OF EXCHANGE. See *Foreign Bill of Exchange*.

BOND OF ANNUITY. See *Rei Interventus*.

BURGH, ROYAL.

A claimant for enrolment as a voter in a royal burgh was admitted by the sheriff to the roll of parliamentary voters, and his name was transferred to the list of municipal electors appointed by the municipal reform act to be completed on or before the 16th of September yearly, but the judgment of the sheriff admitting him was reversed by the Appeal Court, and his name struck out of the parliamentary roll in October thereafter:—Held (affirming the judgment of the Court of Session) that he was, notwithstanding, qualified to be elected a councillor of the burgh at the immediately ensuing election, in November. Question, Whether suspension and interdict be a competent mode of trying the validity of the election of a town councillor, under the municipal reform act, whose induction to the office had not been completed? *Monteith and others v. M'Gavin*, July 20, 1838, - - - III. 290

See *Poor*.

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CANAL. See *Road*.

CAUTIONER.

1. Circumstances in which held (reversing the decision of the Court of Session) that the cautioner for the trustee on a sequestrated estate was not liberated by alleged neglect on the part of the commissioners in detecting fraud and malversation on the part of the trustee. *M'Taggart, &c. v. Watson*, April 16, 1835, - I. 553
2. Co-obligants or cautioners in a cash credit were charged to pay the balance due on a certified account made out from the books of the bank in the form stipulated by their bond:—Held (reversing the judgment of the Court of Session) that they were not liable for any balance arising on drafts drawn and issued, and known to the bank agent to be so, beyond the statutory distance of ten miles; or wrong dated in point of time or of place, and known to the bank agent to be so; although there had been accounts docketed by the principal obligant, and balances certified in which these drafts were included. *Swan and others v. Bank of Scotland*, July 6, 1835, - - - II. 67
3. Circumstances in which (reversing the judgment of the Court of Session) a remit was made to pass a bill of suspension by a cautioner pleading the privilege of discussion, although the principal obligant was dead, and also relief from liability by negligence. *Wishart v. Wishart*, May 12, 1837, - - - II. 564
See *Factor, Judicial*.—*Payment*.—*Prescription*, *Septennial*.—*Rei Interventus*.

CLAUSE. See *Arbitration*, 1.—*Entail*.—*Foreign*.—*Heir and Executor*.—*Husband and Wife*, 2. 4.—*Teinds*, 1.—*Testament*, 3.

COAL. See *Bankruptcy*, 1.—*Lease*, 1.

COLLATION.

1. Question remitted for further consideration to the Court of Session, whether an heir succeeding to entailed estates as heir substitute by the death of a preceding heir is entitled, as one of the nearest of kin of the deceased, to participate in his moveable succession with another of the nearest of kin, without collating the entailed estates. *Anstruther v. Anstruther*, April 15, 1835, - - - I. 463
2. Held (affirming the judgment of the Court of Session) that an heir of entail, who was at the same time heir of line and one of the nearest of kin, was not entitled to a share of the personal estate of the deceased without collating the heritage to which as heir he had succeeded. *Anstruther v. Anstruther*, August 16, 1836, - - - II. 369
3. Held (affirming the judgment of the Court of Session), 1, that an heir of entail who succeeds his father in entailed estates under a destination to heirs male cannot claim legitim without collating his life interest in the entailed estates: 2, Circum-

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COLLATION—*continued.*

stances held not sufficient to amount to a discharge or renunciation of legitim. *Breadalbane v. Chandos*, August 16, 1836,

II. 377

COLLEGE. See *Corporation*.

COMMISSION. See *Agent and Principal*.

CONDITION. See *Testament*.

CONTRACT, IMPLIED.

Circumstances in which a solicitor in the Supreme Courts having offered to a young man from the country 30*l.* or 35*l.* a year to act as his clerk, which was declined; but the clerk entered on the solicitor's employment, and was paid for several years according to his writings, under deduction of sums varying from a half to less than a fourth of his usual fees:—Held (affirming the judgment of the Court of Session), in an action at the clerk's instance for a balance due to him, that the course of dealing must regulate the settlement between the parties; and that the clerk was entitled, for the periods embraced in his two last notes of writings, to payment of the usual fees, under deduction of one fourth during the first, and of one fifth during the second of these periods, as it was to be presumed that the rate of deduction was to diminish with his increased experience, but that he was never to receive full payment. *Clyne's Trustees v. Stewart*, June 17, 1835, - - - - - II. 45

CORPORATION.

The Court of Session having held, 1, that the Faculty of Physicians and Surgeons in Glasgow are a legal corporation; 2, that the Faculty by virtue of the charter 1599, ratified by parliament in 1672, have power to debar from the practice of surgery persons who have not submitted to examination before them, or who have not attained their licence to practise; 3, that the degree of doctor of physic from a university where medicine is taught does not entitle the possessor to practise surgery within the bounds specified in the charter, unless he obtains a licence from the faculty; 4, that a testimonial of skill in surgery from a university where surgery is taught, or the degree of master in surgery recently introduced in the University of Glasgow, does not entitle the possessor to practise surgery within these bounds, unless he submits to examination by the Faculty, and is licensed by them;—and the University of Glasgow having appealed against this judgment;—The House of Lords remitted the cause to the Court of Session, with directions to consider whether the Faculty of Physicians and Surgeons of Glasgow are a corporation capable in law of possessing and in fact clothed with the rights for which they contend in this action. *University of Glasgow v. Faculty of Physicians*, August 28, 1835, - - - - - II. 275

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DAMAGES. See *Proof*, 1.

DECREE IN ABSENCE.

A decree of certification contra non producta was obtained against a pupil in an action of simple reduction of his father's disposition and sasine, brought on the ground of the disposition having been granted in trust, without value, to defraud the grantor's creditors; and an action of reduction-improbation was thereafter brought of the disposition and sasine on the same grounds, with the additional ground of forgery, the summons in which was taken to see by a procurator for the pupil, and the production satisfied, and decree in terms of the libel pronounced, because of no farther appearance; but the pupil had no tutors or curators, and no tutor ad litem was appointed to him in either action; and a reduction being brought of these two decrees, and of the titles following thereon, by the heirs of the pupil, upwards of forty years afterwards; and it having been found by the Court of Session that these decrees did not form a valid title to exclude the reduction, in respect, 1, that they were to be held as decrees of certification or reduction, pronounced in absence; 2, that such decrees were liable to be opened up at any time within the period of the long prescription, and that the personal citation of the pupil was no bar to a reduction after his death; 3, that the minority of the parties in right for the time to challenge the decrees fell to be deducted from the period of prescription; 4, that the various sales and transferences which had been made to singular successors (against those of whom in possession the reduction was directed) did not bar the action;—and an appeal being taken to the House of Lords against this judgment;—Cause remitted, with instructions to take the opinions of the whole judges. *Brown and others v. Sinclair and others*, July 17, 1835, - - - - - II. 108

DECLARATOR. See *Process*, 1.

DEED, CONSTRUCTION OF. See *Foreign*.

DISCHARGE.

A wife conveyed her heritable estate to her husband on condition that he should make payment of all debts due by her, and of all provisions settled or to be settled by her on her children; she granted bonds of provision to her daughters, and one of them after her mother's death, on occasion of her marriage, granted a discharge in her marriage contract, in consideration of a tocher by her father, of all she could claim in right of her father or of her mother in any manner of way, and in full of every claim competent to her of all bairns part of gear, legitim, portion natural, executry, and every thing else that she could ask and claim by and through the decease of her said father and mother:—Held (affirming the judgment of the Court of Session) that the bond of provision was not included in the discharge. *Glendonwyn v. Gordon*, February 2, 1838, - III. 57
See *Collation*, 3.

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DIVORCE. See *Husband and Wife*, 3.

ENTAIL.

1. The prohibitory clauses of an entail being directed against the institute and the other heirs of tailzie, but the irritant clause being only directed against the debts and deeds of "the said heirs of tailzie," without specifying the institute,—Held (affirming the judgment of the Court of Session) that it was lawful for the institute to sell. *Lord Elibank, &c. v. Murray*, March 19, 1835, - I. 1
2. An entailor in his deed of entail, by a clause immediately following the destination, declared that the burdens, reservations, conditions, provisions, restrictions, limitations, and clauses irritant therein-after expressed should be binding on the institute as well as the substitutes; and the prohibitory clauses against selling, burdening, or altering the order of succession were directed against the institute as well as the substitutes; but certain other prohibitory clauses and the whole of the irritant and resolute clauses were directed against the "heirs of tailzie" only, without mentioning the institute:—Held (reversing the decision of the Court of Session) that the entail was ineffectual to prevent the institute from selling the lands and disposing of the price at pleasure. *Morehead v. Morehead, &c.*, March 31, 1835, - I. 29
3. Circumstances in which held (reversing the judgment of the Court of Session) that the syntax of the irritant clause of an entail being defective, from a clerical omission which might by possibility have been supplied by other words than those which the context indicated to have been intended to be inserted, the entail was insufficient to prevent the heir in possession from selling or burdening the lands. *Sharpe v. Sharpe, &c.* April 18, 1835, - I. 594
4. Under a strict entail containing clauses against contracting debts, &c., "but excepting and reserving furth and from the said clause irritant full power and liberty" to the heirs of tailzie "to take on debts for the provision of their younger children, not exceeding three years free rent of the lands and others foresaid, after deduction of liferents and real debts," &c.,—Held (affirming the judgment of the Court of Session), 1, that the heir in possession might grant provisions to his younger children to the extent of three years free rent, payable at the first term after the failure of heirs male of his body, when the lands should devolve on an heir not descended of him; and, 2, that the parties in right of the provisions might recover them from the heir in possession, with interest from the time the provision fell due, although that heir was not descended from the grantor, and had not succeeded to the lands at the time the provisions became payable. *Porterfield v. Howden*, May 14, 1835, - I. 739
5. A deed of entail was executed in 1708, and an heir of entail expedite a charter of resignation and infeftment in 1733, referring to the

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ENTAIL—*continued.*

entail, as if the charter were intended to be in conformity therewith, but which in fact altered the destination; and in an action raised in 1822 it was decided that the charter was fortified by prescription, and was not controlled by the reference to the entail:—Held, in another action to try whether the fetters of the entail were effectually laid on the heirs of the investiture under the charter, (affirming the judgment of the Court of Session,) that, although the charter was in various respects inaccurately framed, it was, on the whole, effectual to oblige the heirs succeeding in virtue of it to hold the estate under the conditions of entail particularly recited, and to prevent them from altering the order of succession laid down in the dispositive clause, and from holding the estate, in other respects, free from the fetters against selling or contracting debts. *Vere v. Hope and others*, July 14, 1837. - - - II. 817

6. An entailer disposed his lands to himself in liferent, and to his son in fee, whom failing, to a series of substitute heirs of entail, and the irritant and resolute clauses provided, that if "the heirs descending of my body, or any of the other heirs of "tailzie before mentioned shall contravene," &c., "the person "or persons so contravening shall forfeit," &c.:—Held (affirming the judgment of the Court of Session) that these words did not apply to the institute, although he was "an heir descending of the body" of the entailer; and the structure of the deed showed that the entailer considered the institute to be included under the term "heirs of entail." *Macgregors v. Brown*, February 12, 1838, - - - III. 84
7. Held (reversing the judgment of the Court of Session) that where there was a prohibition in an entail against sales, and in the irritant and resolute clauses there was a general declaration followed by a particular enumeration of the acts struck at, without specifying sales, the entail was not effectual to prevent a sale of the estate. Question, Whether it be a fatal objection to an entail, that the prohibitory, irritant, and resolute clauses in an entail are not recited in the procuratory of resignation and precept of sasine, as well as in the body of the deed itself? *Rennie v. Horne*, March 13, 1838, - - - III. 142
8. Held (affirming the judgment of the Court of Session) that although there was no exclusion of heirs portioners in an entail under which an heir male succeeded as the heir of the body of a nominatim substitute, the entail was effectual against him. *Mure v. Mure and others*, May 18, 1838, - - - III. 237
9. An entailer destined his estate to the "eldest son" of his first, second, and third daughters seriatim; then to the "second son" of each seriatim; and then to the "heirs male" of his "first, "second, and third daughters in the same order of succession:—Held (affirming the judgment of the Court of Session) that after the first and second sons of the three daughters had failed the heir male of the eldest daughter, though he was the fourth son, took before the heir male of the second daughter,

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ENTAIL—*continued.*

posterior to her second son. *Shepherd v. Grant*, May 28, 1838, - - - III. 255

See *Collation*.—*Succession*.—*Teinds*, 1.

EXCAMBION. See *Teinds*, 1.

EXPENSES.

1. Although a party was allowed to compare as a defender in a process, yet as it was afterwards found that he could not get any decree of absolvitor under it, and his appearance had been resisted by the pursuer,—Held (reversing the judgment of the Court of Session) that the pursuer was not liable to pay the expenses of opposing his compareance. *Duke of Hamilton v. Mather and another*, May 12, 1837, - - - II. 586
2. No expenses having been moved for at the time of pronouncing a judgment in the Inner House of the Court of Session, and a petition craving them having been subsequently presented,—Held (affirming the interlocutor of the Court of Session) that the petition was incompetent. *Bremner v. Kerr*, July 14, 1837, - - - II. 895

See *Agent and Client*.—*Arbitration*, 1.—*Process*, 6. 13.—*Trust*, 3.

FACTOR, JUDICIAL.

Held (affirming the judgment of the Court of Session) that a bond of caution for a factor loco tutoris was effectual to compel him to account for the factor's intromissions, though it contained no express obligation that the factor should account for intromissions. *Bremner v. Kerr*, July 14, 1837, - - - II. 895

See *Payment*.—*Prescription*, *Septennial*.

FEE AND LIFERENT. See *Testament*, 1. 3.

FISHING.

Question, Whether stake-nets placed on sand banks adjacent to the river Nith fall under the exception of the statute 1563, c. 68., as to cruives and yairs upon the water of Solway. *Oswald, &c. v. McWhir*, April 13, 1835, - - - I. 393

FOREIGN.

A domiciled Englishman, who was debtor in an heritable bond over a Scotch estate, the contents of which bond he had consigned in the Bank of Scotland, having executed an English will, by which he declared that the consigned sum should belong to certain trustees; having thereafter executed a Scotch trust deed and settlement, in which he stated that he had, in a separate will as to his property in England, directed that the consigned sum should be transferred to his trustees; and having thereafter executed another English will, which had the effect generally of revoking the first will, and which bequeathed all his personal estate to an executor:—Held (affirming the judgment of the Court of Session), 1, that the Scotch Court had a right and were bound to look at the first will in the same way as it

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FOREIGN—*continued.*

would have been looked at in England, in order to discover the testator's intentions as to the consigned sum : 2, that the deeds contained a sufficient declaration of the intention of the testator to appropriate the consigned sum to his trustees ; and, therefore, that the trustees fell to be preferred to that sum, and not the executor. *Yeats v. Thomson, &c.*, June 5, 1835, - I. 795
See *Husband and Wife*, 3.

FOREIGN BILL OF EXCHANGE.

A bill of exchange was drawn and accepted in a foreign country, and admitted to be payable there, though not specially bearing a place of payment, and the acceptor, who was a native of Scotland, possessing a landed estate there, returned there before the bills fell due :—1, Held, in an action brought against his representatives nineteen years thereafter (reversing the judgment of the Court of Session), that the bill was subject to the sexennial prescription, according to the *lex fori*, and not to the foreign prescription of the *locus contractus*. 2, The payee having, after they fell due, instituted judicial proceedings in the foreign country, and obtained decree against the drawer and acceptor, who was then in Scotland, and he not having received intimation of them, nor having appeared, and not being able to appear, the two countries being in a state of war at the time :—Held that the decree was not a *res judicata*, and formed no interruption of the sexennial prescription as against the acceptor. *Don v. Lippmann*, May 26, 1837, - - - - - II. 682

FRAUD. See *Proof*, 2.

HEIR AND EXECUTOR.

A party possessed of two estates, the one of which he held in fee simple, and the other under an entail, which allowed reasonable provisions for younger children, having bound himself, and his heirs succeeding to these two estates, to pay certain provisions to his younger children ; and the first heir who succeeded to these estates having possessed them without paying the provisions ;—Held (affirming the judgment of the Court of Session) that the second heir succeeding to these estates was liable, without relief against the executors of the first heir. *Lord M'Donald v. M'Donald*, April 13, 1835, - - - - - I. 341

HEIRS PORTIONERS, See *Husband and Wife*, 1.

HERITABLE BOND. See *Bankruptcy*, 2.—*Husband and Wife*, 1.—*Trust*, 1.

HERITABLE OR MOVEABLE. See *Discharge*.

HERITABLE SECURITY. See *Agent and Principal*.

HUSBAND AND WIFE.

1. A husband was proprietor of an estate subject to payment of the price to three heirs portioners, one of whom was his wife ;

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HUSBAND AND WIFE—*continued.*

he granted an heritable bond and disposition in security to a creditor, and the wife assigned in further security her one third share and interest thereof; the husband having become bankrupt, and there being a deficiency in the price,—Held, in a question between the two heirs portioners and the creditor as assignee of the wife, (affirming the judgment of the Court of Session,) that the two heirs portioners were preferable to the interest of her third share, to the effect of recovering full payment of their respective shares. *Napier v. Glendonwyn, &c.*, April 13, 1835, - - - I. 374

2. A husband by antenuptial contract of marriage having conveyed his "half of the nine-shilling-and-ninepenny land of old extent "in the Garth quarter called Bullshill" to himself and his promised spouse "in conjunct life-rent during all the days of their "lifetime, and to the longest liver of them, and their heirs or "assignees in fee;"—Circumstances in which held (affirming the judgment of the Court of Session), 1, that the conveyance comprehended the whole lands in the Garth quarter belonging to the husband, being the half of a nine-shilling-and-ninepenny land, which half was called Bullshill: 2, that the wife having survived the husband the fee was in her. *Forrester v. Trustees of Macgregor or Forrester*, April 13, 1835, - - - I. 441
3. An action of divorce was brought in the Court of Session by a domiciled Scotchman against his wife, who was an Englishwoman, to whom he had been married in England, and who was resident abroad in virtue of a contract of separation, which bore to be irrevocable, unless by joint consent:—Held (affirming the judgment of the Court of Session), 1, that the domicile of the husband was the domicile of the wife, and that the action was competently instituted in the Scotch courts,—the contract of separation being considered to be revocable, and to be virtually revoked by the execution of the summons: 2, that the wife was sufficiently cited by an edictal citation and personal intimation, without leaving a copy of the summons for her at her husband's dwelling place in Scotland: 3, that the marriage, although contracted in England according to the rites of the English church, and therefore indissoluble by the courts of that country, might be dissolved by the Scotch courts on the ground of adultery committed abroad. *Warrender v. Warrender*, August 27, 1835, - - - II. 154
4. Construction of a marriage-contract between an officer whose widow was entitled to the benefits of an annuity from the Bombay Military Fund, and which he bound himself to secure to his wife in case of surviving him, under which it was held (in part affirming and in part reversing the judgment of the Court of Session) that on a partial diminution of the amount of the annuity, and notwithstanding her second marriage, his estate was liable in payment to his widow of an annuity equal in amount to that which was originally payable from the fund. *Forlong v. Taylor's Executors*, April 3, 1838, - - - III. 177

See *Discharge.—Presumption.*

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HYPOTHEC. See *Lease*, 2.

INTERDICT. See *Lease*, 5.

INTEREST.

1. Interest allowed on the consideration awarded from the date of the summons. *E. of Elgin v. Sir C. Halkett, Bart.*, April 16, 1835, - - - I. 629
2. A party, pending a discussion as to the rate of interest for which he was liable on trust funds in his hands, consigned in Court a sum as the full amount of principal, and interest at four per cent., and he was afterwards found liable in five per cent.:—Held (affirming the judgment of the Court of Session) that he was bound to account for interest on the sum short consigned, and that an objection that this was a charge of interest on interest did not apply, seeing that the consignment was not definite, the question as to the rate of interest being undecided. *Roberts v. Court and others*, July 25, 1838, - - - III. 317

IRRITANCY. See *Personal or Real*.

JUDICIAL FACTOR. See *Factor, Judicial*.

JURISDICTION.

Penalties being imposed by a road act for evasion of tolls on conviction "before one or more justices of the peace," with leave to persons considering themselves aggrieved to apply by summary complaint to the Court of Session,—Questions, 1, Whether an advocacy be a competent form of complaint? 2, Whether that Court has jurisdiction to convict and find offenders liable in the penalties? and, 3, Whether there must be a conviction by the justices? *Morrison and others v. Mitchell*, June 25, 1838, III. 285.

See *Husband and Wife*, 3.

LANDLORD AND TENANT. See *Lease*.

LEASE.

1. (1.) Circumstances in which the tenant of two separate coal fields (between which a coal field of his own was situated), with a right to the use of a level for working the fields let to him, was held (affirming the judgment of the Court of Session) liable to pay the landlord a consideration for the benefit which the tenant derived from carrying the level through his own interjected field in passing onwards to the upper coal field let to him. (2.) In estimating the benefit so derived it is competent to take into view the facilities which the tenant enjoyed as to draining his own field, either from the porous nature of the strata, or the possession of another level. *E. of Elgin v. Sir C. Halkett, Bart.*, April 16, 1835, - I. 629
2. A proprietor let premises for a manufactory, and bound himself to communicate to them a supply of steam power by means of a shaft from an engine in adjoining premises belonging to him, and to furnish a supply of water; and the rent for the

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LEASE—continued.

- premises was fixed, but the amount of the consideration for the steam power and water was left to the determination of arbiters:—Held (reversing the judgment of the Court of Session) that his right of hypothec over the *invecta et illata* in the premises let, covered only the specific rent fixed for these premises, and not the additional rent stipulated for the steam power and water. *Catterns v. Tennent*, May 12, 1835, - - I. 694
3. An heir of entail granted a lease at a rent of 70*l*.; the tenant subset for a rent of 180*l*., and sold and assigned 100*l*. of the surplus subrent; the assignation was intimated, but the assignee allowed the principal tenant to draw the subrent, and took payment from him of the surplus rent; and the lands were afterwards disentailed and sold:—Held, in a question with the purchaser (affirming the judgment of the Court of Session), that he was not liable to pay the surplus rent. *Balfour v. Lyle and another*, June 12, 1835, - - - II. 1
4. Circumstances in which, it having been found by the House of Lords, on a former appeal, that the tenant of a farm was entitled at the end of the lease to meliorations for houses and biggings, in so far as the original houses and biggings on the farm had been improved, or others suitable to the farm had been erected, but not for any other houses and biggings built of new,—Held (affirming the judgment of the Court of Session) that the tenant was entitled to various specific sums for meliorations. *Grahame v. Jolly*, June 17, 1835, - - - II. 24
5. A landlord let premises to a tenant for nineteen years, “to be used for the purpose of bleaching, dyeing, or printing, and any other operations connected with bleaching, dyeing, or printing, or for agriculture,” and the tenant subset the premises. In an action against the landlord, the tenant, and the sub-tenants, for interdict, on the ground that the operations of the sub-tenant amounted to nuisance, two issues were sent to trial, one as to the fact of nuisance created by the sub-tenant, and another, “Whether the landlord or tenant, by themselves, or another or others authorized by them, did wrongfully pollute and spoil the water,” &c. At the trial the Judge directed the jury on the first issue in terms as to the law which were afterwards held to be erroneous; and on the second issue, that even if nuisance was proved against the sub-tenants, still as there was nothing but the lease to connect the landlord and the tenant therewith, there was no ground in law for holding that they or either of them had authorized or were answerable for that nuisance; and a verdict, which was found for all the defenders, was set aside, and a new trial allowed on both issues; and this was acquiesced in as to the first issue:—Held (affirming the judgment of the Court of Session) that as the charge given under the first issue was erroneous, a new trial should be allowed of the second issue. *Hamilton and another v. Dunn*, July 30, 1838, - - - III. 356

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LEGITIM. See *Collation*, 3.

LIFERENT AND FEE. See *Husband and Wife*.

MARRIAGE CONTRACT. See *Discharge*.—*Husband and Wife*, 2. 4.

MASTER AND SERVANT.

Held (reversing the judgment of the Court of Session) that a barber's apprentice, under an indenture which bound him "not to absent himself from his master's business, holiday or week-day, late hours or early, without leave first asked and obtained," could not be lawfully required to attend his master's shop on Sunday mornings for the purpose of shaving customers, in respect such employment infers a violation of the act 1579 and other statutes enacted for enforcing the observance of the Sabbath. Opinions of the judges on appeal in regard to the proper interpretation of the exception in the act 1690, c. 21., respecting "the duties of necessity and mercy." *Phillips v. Innes*, February 20, 1837, - - - II. 465

See *Contract, Implied*.

MINOR. See *Decree in Absence*.

MORA. See *Account*.

NUISANCE. See *Lease*, 5.

OBLIGATION.

Held (reversing the judgment of the Court of Session) that the Water Company of Edinburgh is not liable, under the statutes incorporating it, to supply water gratuitously to the charity workhouse of that city, although water had been so supplied to it upwards of eighty years by the magistrates, and by the company as their successors. *Edinburgh Water Company v. Waugh*, May 5, 1837, - - - II. 530

See *Factor, Judicial*.—*Payment*.

PARENT AND CHILD. See *Presumption*.

PARTNERSHIP. See *Arbitration*, 2.

PAYMENT.

Where a cautioner for a judicial factor died in 1804, at which time a debt was due by the factor, and the factory continued till the death of the factor in 1826, and in the meantime payments were made by the factor sufficient to extinguish the debt in 1804, but ultimately a balance was due by him,—Question remitted for the opinion of all the judges, Whether the obligation of the cautioner came to an end by his death; and if so, whether his representatives were entitled to have the subsequent payments applied in extinction of that debt. *Bremner v. Kerr*, July 14, 1837, II. 895

PERSONAL OR REAL.

Question remitted for the opinion of all the judges of the Court of Session, Whether certain conditions, in a building feu contract,

IN THE THREE VOLUMES.

PERSONAL OR REAL—*continued.*

were effectual against a singular successor, without being declared real or fortified by clauses of irritancy. Tailors of Aberdeen v. Coutts, May 23, 1837, - - - II. 609

PERSONAL OBJECTION. See *Trust*, 3.

PHYSICIANS AND SURGEONS, FACULTY OF. See *Corporation*.

POOR.

1. Held (reversing the judgment of the Court of Session), in a question between the heritors of a landward district and the magistrates of a royal burgh, both situated within one and the same parish, that the management and maintenance of the poor of the landward district were not separate from the management and maintenance of the poor within the burgh, but that the poor of both districts must be regarded as the poor of one parish. The Magistrates of Dunbar v. The Heritors of Dunbar, April 10, 1835, - - - I. 134
2. Held (reversing the judgment of the Court of Session) that the city of Edinburgh is entitled to levy and apply to the use of the poor of the city money assessed for the poor on the Waterloo Hotel, although the ground on which it is built is situated within the parish of South Leith, the same having been annexed by statute to and incorporated in the royalty, but not expressly disjoined from South Leith; and that the parish of South Leith is not also entitled to poor's rates from the proprietors of the hotel. McCraw and Hill v. Cuninghame, July 14, 1837, - II. 773

POSSESSION. See *Town Clerk*.

PRESCRIPTION. See *Account*.—*Decree in Absence*.

PRESCRIPTION, SEPTENNIAL.

Question, Whether the septennial prescription applies to a bond of caution for a judicial factor where the cautioner died pending the factory,—remitted for the opinion of all the judges. Bremner v. Kerr, July 14, 1837, - - - II. 895

PRESCRIPTION, SEXENNIAL. See *Foreign Bill of Exchange*.

PRESUMPTION.

- (1.) In a question as to the paternity of a child born before the marriage of the alleged father with the mother, there is no presumption that he is the father; but the fact of paternity must be proved. (2.) Question, Whether a child born 301 days after access by the alleged father could be held to be his child? Innes v. Innes and others, Feb. 20, 1837, - - - II. 417

PRIVILEGE, EXCLUSIVE. See *Corporation*.

PROCESS.

1. A proof was taken before the bailies of a burgh, and in an advocacy the Lord Ordinary pronounced a special judgment

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PROCESS—*continued.*

- on the facts; a relative action of declarator was brought by the advocator, and of consent of parties the proof was held as repeated in the declarator, and the processes were conjoined, and the respondent was assoilzied. An objection by the respondent to an appeal entered in the conjoined processes that it was incompetent under 6 Geo. 4. c. 120. s. 40. sustained in so far as the appeal related to the matters of fact. *Jack v. Lyall*, April 1, 1835, - - - I. 77
- 2. Circumstances under which a special case, which was substituted by agreement of parties for a verdict, was insufficient to afford grounds for pronouncing judgment; and a remit made to the Court of Session to cause an issue to be sent to a jury. *Oswald, &c. v. M'Whir*, April 13, 1835, - - - I. 393
- 3. After a remit had been made to a judicial inspector to report, and he reported, a remit to the Jury Court refused. *E. of Elgin v. Sir C. Halkett, Bart.*, April 16, 1835, - - - I. 629
- 4. Question, Whether, where no objections are lodged to an auditor's report as to taxation of accounts, and an appeal is entered against the judgment of the Court approving of that report, it be competent to enter on the merits in the House of Lords; and if not so, whether, the only other question being one of costs, an appeal be competent? *M'Aulay v. Adam and Brown*, May 7, 1835, - - - I. 665
- 5. An appeal against interlocutors ordering issues, and remitting them for trial to a jury, held incompetent. *Balfour v. Lyle and another*, June 12, 1835, - - - II. 1
- 6. A respondent was found entitled to expenses in the Court of Session, and on appeal the case was remitted on the merits with special findings, and the interlocutors were, in so far as inconsistent with them, reversed:—Held that the reversal did not apply to the expenses, and that the respondent was entitled to them. *Grahame v. Jolly*, June 17, 1835, - - - II. 24
- 7. A party who has closed a new record is not entitled to refer to the old record as qualifying or contradicting the new. *Grahame v. Jolly*, June 17, 1835, - - - II. 24
- 8. Circumstances in which a judgment of the House, embodying an agreement of parties, was recalled. *Clyne's Trustees v. Edinburgh Oil Gas Light Company*, August 27, 1835, - - - II. 243
- 9. Two counsel only are entitled to be heard on the same point, although there be separate appellants under separate appeals. *M'Craw and Hill v. Cuninghame*, July 14, 1837, - - - II. 773
- 10. Circumstances in which a process of multiplepoinding was held competent, although it was alleged that there was not double distress. *M'Craw and Hill v. Cuninghame*, July 14, 1837, II. 773
- 11. Held, on an objection taken at the bar, confirming *Murdoch v. Wyllie*, 10th March 1832, that advocacy brings the whole process from the inferior court to the Court of Session; and therefore, that where certain findings in a judgment had been pronounced in an inferior court adverse to a defender, but he was assoilzied, and the pursuer brought an advocacy, the

IN THE THREE VOLUMES.

PROCESS—*continued.*

- defender was entitled to argue the case as if adverse findings had not been pronounced. *Cunningham v. Dod's Trustee*, July 17, 1837, - - - - - II. 984
12. An appeal is incompetent against an interlocutor of the Court of Session finding that in the cases enumerated in the acts of parliament regarding trial by jury in civil causes, when the conclusion is for damages, the Court has no power to take proof by commission on remit or in presentia, but must remit all such cases to be tried by jury. Observed (obiter) that the judgment of the Court of Session was well founded. *Bald and others v. Kerr*, June 19, 1837, - - - - - III. 1
13. In an action against a town council and the councillors, nominatim as councillors, "and for themselves," decree was pronounced in terms of the libel, and for expenses:—Held that one of those councillors was entitled to present a petition of appeal, although the town council declined to appeal. *Gray v. Forbes and others*, August 16, 1838, - - - - - III. 381
- See *Bankrupt.—Burgh, Royal.—Expenses*, 1.—*Jurisdiction*.

PROOF.

1. (1.) Parole proof to control the terms of a written agreement refused to be admitted. (2.) Circumstances under which two defenders were held (affirming the judgment of the Court of Session) bound under an agreement with a pursuer in mutual relief of a claim of damages, although it was afterwards proved that neither party was the cause of the damage. *Johnston v. Edinburgh and Glasgow Canal Co.*, April 9, 1835, - - - - - I. 117
2. Circumstances under which the partners of a joint stock company were held (affirming the judgment of the Court of Session) to be competent witnesses in a question, whether a partner had purchased shares for behoof of another person, who alleged that he had been deceived by misrepresentations to agree to purchase. *Syme v. Brown*, May 12, 1835, - - - - - I. 723
3. Circumstances in which (affirming the judgment of the Court of Session), in a declarator of marriage and legitimacy, a witness for the defenders having deposed on her cross-examination that she was the wife of a certain individual, and the pursuers not having protested for reprobaters, but allowed circumduction to be made, and having thereafter, on the ground of *res noviter veniens ad notitiam*, applied for leave to adduce proof that the witness was not, and knew that she was not, the wife of the individual she had named, but that he had been previously assoilzied from an action of declarator of marriage at her instance, the House of Lords refused to allow this proposed additional proof to be led. *Innes v. Innes and others*, Feb. 20, 1837, - - - - - II. 417

See *Account.—Bankruptcy*, 3.—*Process*, 1.

PROVISIONS TO CHILDREN. See *Entail*.

PUBLIC OFFICER. See *Town Clerk*.

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REAL OR PERSONAL. See *Personal or Real*.

RECORD. See *Process*, 7.

REFERENCE, JUDICIAL. See *Arbitration*.

REGISTRY. See *Ship*.

REI INTERVENTUS.

A bond of annuity was granted by three parties, and the signature of one of them, A., was duly attested; while the signatures of the other two, B. and C., were attested by two witnesses, but of whom one only was duly designed in the testing clause; thereafter, on the faith of the bond, the price of the annuity was paid to A., through the hands of B., as A.'s agent, or at least in B.'s presence, and with his knowledge:—Held (affirming the judgment of the Court of Session) that B. was barred by rei interventus from objecting to the error in the testing clause; and that this was not effected by the circumstance that C. had died in the interim, and that the rei interventus did not extend to him. *Hamilton v. Wright and others*, Feb. 12, 1838, - III. 127

RELIEF. See *Heir and Executor*.

REMUNERATION. See *Lease*, 1, 2.

RENT. See *Lease*, 3.

RES JUDICATA. See *Foreign Bill of Exchange*.

RES NOVITER. See *Proof*, 3.

RIGHT IN SECURITY. See *Husband and Wife*.—*Lease*, 3.—*Ship*.

ROAD.*

Held that, under the Stirlingshire road acts (34 Geo. III. c. 138. and 50 Geo. III. c. 16.), persons who use carriages for travelling on the tracking paths or roads on the banks of the canal may be considered guilty of evading the tolls, notwithstanding they do not travel one hundred yards on the turnpike road. *Morrison and others v. Mitchell*, June 25, 1838, - III. 286
See *Jurisdiction*.

ROYAL BURGH. See *Burgh, Royal*.

SABBATH. See *Master and Servant*.

SALE.

Circumstances in which held (affirming the judgment of the Court of Session) that a correspondence relative to the purchase of a land estate did not amount to a concluded contract. *Milne v. Marjoribanks's Trustees*, March 16, 1837, - II. 494
See *Entail*.

SEPTENNIAL PRESCRIPTION. See *Prescription, Septennial*.

SEQUESTRATION. See *Bankruptcy*.—*Trust*, 1.

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SERVITUDE.

Circumstances in which a servitude of eavesdrop was sustained in favour of one party over the property of another. *Jack v. Lyall*, April 1, 1835, - - - I. 77
See *Obligation*.

SETTLED ACCOUNT. See *Cautioner*.

SEXENNIAL PRESCRIPTION. See *Prescription, Sexennial*.

SHIP.

A party residing in Edinburgh, who stood upon the register of a ship as sole owner, held (affirming the decision of the Court of Session) liable for furnishings made in London to the ship on the order of the master, although he alleged that the master was the only owner, and that he himself was merely a creditor of the master, and had acquired right to the vessel merely in security of debt. *Leslie v. Curtis*, April 3, 1838, - - III. 230

STATUTE.

1563, c. 68. See *Fishing*.
1579, c. 70. See *Master and Servant*.
1690, c. 21. See *Master and Servant*.
1696, c. 5. See *Bankruptcy*.
10 Geo. III. c. 51. See *Teinds*.
34 Geo. III. c. 138. See *Road*.
50 Geo. III. c. 16. See *Road*.
54 Geo. III. c. 137. See *Bankruptcy*.
6 Geo. IV. c. 120. See *Process*, l.
3 & 4 Will. IV. c. 76. See *Burgh, Royal*.
See *Arbitration.—Obligation*.

SUCCESSION. See *Collation.—Entail*.

SUSPENSION AND INTERDICT. See *Burgh, Royal*.

TACITURNITY. See *Account*.

TAXATION OF ACCOUNTS. See *Process*, 4.

TEINDS.

1. An excambion was made under the statute 10 Geo. 3. c. 51. between the proprietor of an entailed estate and another proprietor, by which it was declared that all lands given by the entailed proprietor should be held of him for delivery of a certain quantity of meal and payment of a sum of money, "in full of all feu and teind duties;" and the entailed proprietor was titular of the parish, but he did not transact in that character:—Held (affirming the judgment of the Court of Session) that under the circumstances the other party was not entitled to insist that the meal and money so payable should be allocated primo loco as free teinds in the titular's hands. *Hamilton v. Duke of Hamilton*, March 31, 1835, - I. 65
2. Held (affirming the judgment of the Court of Session) that teind duties are liable to be allocated primo loco, and that an heritor who was localled on for a sum of stipend exceeding the

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TEINDS—*continued.*

- amount of his teind duties was not bound to pay them to the superior titular. *Duke of Hamilton v. Mather and another*, May 12, 1837, - - - - - II. 586
3. Held (affirming the judgment of the Court of Session) that certain lands in the parish of Ballingry, called Mains of Inchgall, which were valued in 1629, did not comprehend two other parcels of land under that denomination. *Scott v. Kerr and another*, July 15, 1837, - - - - - II. 968

TESTAMENT.

1. A testator conveyed his property to trustees, to be held in part for a married daughter for her liferent use allenary, and in fee for her children, and failing of children for her other heirs and assignees whatsoever. She had four children, who all predeceased her,—two of them only having issue, and two having assigned their interest to their husbands:—Held (affirming the judgment of the Court of Session), on the death of the life-rentrix, that no right of fee had previously vested in any of the children so as to be transmissible by them. *Thomson v. Scougalls*, August 31, 1835, - - - - - II. 305.
2. A party, after having entailed his lands, conveyed to trustees, *mortis causâ*, all lands not entailed, and all future acquisitions, and his personal estate, for the purpose of applying the produce or proceeds to the purchase of lands to be entailed in the same way as he had entailed his other lands, but he gave no express power to sell, and did not specially include a property acquired prior to the date of his entail, and which it was admitted he did not intend to entail:—Held (reversing the judgment of the Court of Session), in a question between the trustees, concluding for power to sell that property and apply the price in buying and entailing lands, and the heir at law, that they were not entitled to a decree to that effect. *Allan v. Glasgow's Trustees*, Sept. 1, 1835, - - - - - II. 333
3. A bequest in a trust deed of settlement of the residue of the testator's estate to trustees, with power to keep up the trust by assumption of new trustees, to apply the proceeds "to such benevolent and charitable purposes as they think proper," with a recommendation, if they exceeded 600*l.*, to vest them in these persons, and apply the annual proceeds in "yearly payments to faithful domestic servants settled in Glasgow or the neighbourhood, who can produce testimonials of good character and morals from their masters or mistresses after ten years' service; no one to be entitled to more than 10*l.* sterling yearly, but as much less as my said trustees may think proper:" or, in the event of the residue not amounting to 600*l.*, to distribute the same "to such charitable and benevolent purposes" as the trustees might think proper:—Held (affirming the judgment of the Court of Session) not to be void through uncertainty. Observed (in support of the judgment of the Court of Session) that where a sum appointed to be lent out on security in liferent to a legatee

IN THE THREE VOLUMES.

TESTAMENT—*continued.*

was at her death to be "payable to the trustees," there was no bequest to the trustees individually, but that the sum was to merge in the general fund of the trust estate. *Miller and others v. Black's Trustees*, July 14, 1837, - - II. 866

TITLE TO EXCLUDE. See *Decree in Absence.*

TOLLS. See *Road.*

TOWN CLERK.

A party was appointed conjunct town clerk for a period of five years, and was in possession of the office:—Held (affirming the judgment of the Court of Session) not competent for the town council to remove him summarily, and without cause assigned, at the expiry of the five years; and a petition and complaint against him for not delivering up the books of the burgh to a new clerk, or to the magistrates, dismissed, in respect that he was willing to execute the duties of clerk. *Magistrates of Annan v. Farish*, July 14, 1837, - - - - II. 930

TRUST.

1. Three trustees, to whom certain heritable subjects had been conveyed, with a power of sale, in relief of obligations undertaken by them, having, in a disposition of part of the subjects, granted in their character of trustees, declared 3,000*l.* of the price to be a real burden, and afterwards taken a bond for that sum payable to them *privatis nominibus*, their heirs and assignees, but without discharging the real burden; having taken a bond for 400*l.* (part of the price of a second portion of the trust subjects) as for cash instantly advanced, payable to them *privatis nominibus*, their heirs and assignees; but having taken a bond for 1,925*l.*, part of the price of a third portion of the subjects, payable to them in their character of trustees,—on all of which bonds infestments followed; and one of the trustees having thereafter been sequestrated, and an action of adjudication having been brought by the solvent trustees, to have the three bonds adjudged to them in extinction of the outstanding obligations of the trust, and in order to equalize the superadvances made by them, which greatly exceeded the advances made by the bankrupt trustee:—Held, 1, (reversing the judgment of the Court of Session) that the creditors on the sequestrated estate of the bankrupt trustee were entitled to a third of the 400*l.* bond, as appearing on the face of the records to have been vested in the bankrupt and his co trustees *privatis nominibus*: 2, (affirming the judgment of the Court of Session) that the bonds for 3,000*l.* and 1,925*l.* fell to be applied, in the first place, in extinction of the outstanding obligations of the trust estate, and, in the second place, in relief of the superadvances of the solvent trustees. *Jeffrey v. Paul*, May 15, 1835, - I. 767
2. Held *ex parte* (reversing the judgment of the Court of Session) that a voluntary trust acceded to by creditors, which gave them a power to elect a new trustee in the event of

GENERAL INDEX OF MATTERS, &c.

TRUST—*continued.*

death or resignation, but in the execution of which the creditors had not proceeded for nine years after the death of the trustee, was still a subsisting trust, and effectual to bar an action of mails and duties against the truster by one in right of a creditor who had acceded to the trust. *Hamilton v. Littlejohn*, March 18, 1836, - - - - - II. 355

3. In a question as to the validity of a deed of settlement challenged as void through uncertainty, the costs ordered to be paid out of the estate to the party challenging, although unsuccessful. *Miller and others v. Black's Trustees*, July 14, 1837, - - - II. 866
See *Testament*, 1, 2, 3.

VALUATION. See *Teinds*, 3.

VERDICT. See *Process*.

WARRANTICE. See *Teinds*, 1.

WATERLOO HOTEL. See *Poor*, 2.

WRIT. See *Rei Interventus*.

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E R R A T A.

- Page 51, line 5, *after* "final" *insert* "and also"
- 6, *after* "Session" *insert comma*.
- 52, 5, *for* "and no appeal" *read* "or no appeal"
- 74, 7 from foot, *for* "heating" *read* "treating"
- 77, 4, 5, *read thus*: "Was or was not the bond heritable—not heritable to the effect" &c.
- 78, 14, *for* "prætorii" *read* "peritorium"
- 79, 6, *for* "reversion" *read* "provision"
- 82, 1, *for* "executable" *read* "exigible"
- 113, 7, *after* "struck" *insert* "at"
- 115, 11, *after* "have" *insert* "been"
- 7 from foot, *for* "forth. Yet" *read* "forth, yet"
- 116, 11, *for* "qui ad" *read* "quoad"
- 20, *for* "case. If explained" *read* "case if, explained"
- 121, 4, *for* "vigorous" *read* "rigorous"
- 124, 12, *for* "designation" *read* "destination"
- 131, 2 from foot, *for* "applicable" *read* "suppliable"
- 132, foot note², line 2, *for* "71620" *read* "17026"
- 137, 3, *for* "619" *read* "669"
- 17, 18, *for* "quilibet enim jure per se introducto remanere potest." *read* "quilibet enim juri pro se introducto renunciare potest."
- 138, 10, *for* "419," *read* "8439,"
- 140, 5, *for* "annuity" *read* "infirmity"
- 166, 9 from foot, *for* "is imperative" *insert* "is not imperative"
- 171, 10, 11, *read thus*: "It means intensive. I prohibit six things. I irritate and resolve,—that is, I declare five" &c.
- 173, 11, *delete* "to"
- 174, ult., *for* "communications" *read* "contraventions"
- 221, 24, *for* "widows" *read* "widow"
- 225, 18, *delete* "used"



